Supreme Court, U.S.
FILED

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No. ____

In The
Supreme Court of the United States

October Term, 1994

USX CORPORATION,
Petitioner,

v.

LESLIE RAY COX, et al.,
Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a defendant, which represents that it will not assert a defense of reliance upon advice of counsel, nor rely upon any privileged attorney-client communication in its defense, nonetheless forfeits its attorney-client privilege under the doctrine of an implied "state of mind" waiver when it asserts in legal memoranda — and in response to plaintiffs' initial allegations of intentional, criminal wrongdoing — that it believed its actions were legal when taken?

PARTIES TO THE PROCEEDING

In addition to the parties listed in the caption, the other respondents are the United Steelworkers of America, AFL-CIO-CLC, defendant-appellant below, and the following additional named plaintiffs-appellees below: Leslie Ray Cox; R.M. Cox; Larry Driver; Barry Nichols; John Bullard; Robert W. Kennedy, Jr.; Lorenzo G. East; Clarence M. Pope, Jr.; C.R. Altes; Jack E. Merrymon; Jessy P. West; R.S. Arnold; M.W. Milstead; J.W. Wade; Manning A.C. Snider; Terry H. Melvin; Thomas E. Hill; Gary D. Swann; Ronald E. Frazier; Anthony J. Crapet; Robert M. Green; Heath L. McMeans, III; Billy Carter; Joe A. Knight; Phillip L. Drummond; Brock Wells; George Boglin; Dennis E. Jones; Dennis R. Fulton; Don L. Flarry; W.T. Mayberry; Willie Young; Robert Poole; Wardell Clark; Willie J. Nation; Oscar Lee Perry; Harold S. Turner; and James R. Miller.*

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*By Order dated August 14, 1990, the district court conditionally ordered that the action below would be maintained as a class action on behalf of the following plaintiffs: "all persons employed in Jefferson County, Alabama, or formerly employed in Jefferson County, Alabama, by USX Corporation, formerly known as United States Steel Corporation (the 'Company'), who at any time from, to-wit, July 1, 1983 to date were represented in collective bargaining negotiations, grievance proceedings, or arbitration proceedings involving the Company by United Steelworkers of America, AFL-CIO-CLC (the 'Union'), or by one or more of the District Director, Sub-District Directors, or staff representatives employed by the Union and assigned to District 36 of the Union."

DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Petitioner, USX Corporation, formerly known as United States Steel Corporation, is a publicly owned corporation with three classes of common stock, USX-Marathon Group, USX-U.S. Steel Group, and USX-Delhi Group.

Non-wholly owned subsidiaries of petitioner, USX Corporation, are as follows: CLAM Petroleum Company, Double Eagle Steel Coating Company, Laredo-Nueces Pipeline Company, National-Oilwell, PRO-TEC Coating Company, USS/Kobe Steel Company, USS-POSCO Industries, Worthington Specialty Processing, Transtar, Inc., LOCAP INC., LOOP INC., Kenai LNG Corporation, Ozark Gas Transmission System, and RMI Titanium Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

USX Corporation ("USX") respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit in this case insofar as it relates to the attorney-client privilege asserted by USX.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit, from which this appeal is taken, is reported at 17 F.3d 1386 (11th Cir. 1994), and appears as Appendix A ("App. A", pp. 1a-78a). The order of the court of appeals denying USX Corporation's petition for rehearing and suggestion for rehearing en banc is reported at 30 F.3d 1347 (11th Cir. 1994), and appears as Appendix E ("App. E", pp. 144a-148a). The pertinent opinions and order of the United States District Court for the Northern District of Alabama appear as Appendix B ("App. B", pp. 79a-126a), Appendix C ("App. C", pp. 127a-131a), and Appendix D ("App. D", pp. 132a-143a).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 5, 1994. On August 19, 1994, the court of appeals denied a timely petition for rehearing and suggestion for rehearing en banc. App. E at 148a. This petition is timely under 28 U.S.C. § 2101(c) and Rule 13.4 of the Rules of the United States Supreme Court. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE INVOLVED

This case involves the application of the attorney-client privilege under Rule 501 of the Federal Rules of Evidence, which provides as follows:

> **General Rule**
>
> Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reas n and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

STATEMENT OF TI E CASE

1. **Factual Background.** USX owns and operates steel-making facilities throughout the United States, including a large integrated mill outside of Birmingham, Alabama, known as the Fairfield Works. In June 1982, after losing $90 million during the first six months of that year, USX indefinitely idled operations at its Fairfield Works and, as a result, laid off thousands of workers employed there. Nearly all of the affected employees were members of the United Steelworkers of America ("Union").

Beginning in September of 1983, USX and the Union conducted negotiations concerning the possible reopening of the Fairfield Works. Ultimately, after three months of

difficult negotiations, several impasses, and the intervention of Alabama Governor George Wallace, USX and the Union reached an agreement on December 24, 1983 (the "Fairfield Works Agreement").

During the course of the Fairfield negotiations, the Union negotiators (Thermon Phillips and E. B. Rich) raised an issue with respect to USX's restrictive policy regarding leaves of absence for former USX employees who had become full-time employees of the Union. At the time of the Fairfield negotiations, many of USX's principal competitors, and numerous other companies and unions in other industries, had adopted liberal leave-of-absence policies which provided for the indefinite accrual of pension service credits by former employees who had accepted full-time employment with their International Unions. USX's historical refusal to conform its leave of absence policy with that of the industry had been a source of controversy between the Union and USX for years. When the Union negotiators raised this issue during the Fairfield negotiations, USX refused to consider the issue as part of those local negotiations. USX advised the Union negotiators that the Company would consider the issue only if it was raised by the International Union separate and apart from the Fairfield negotiations.

In July of 1984, approximately seven months after the execution of the Fairfield Works Agreement, USX received an inquiry that it believed came from the Steelworkers International Union concerning the extended leave of absence matter. In the months that followed, USX considered the Union's request and, ultimately, on October 22, 1984, USX unilaterally amended its leave of absence policy. The revised policy provided that, under

certain circumstances, former USX employees could qualify for leaves of absence of indefinite length to work for their International Union. During such leaves, the former USX employees would continue to accrue continuous service credit for pension purposes as though they had never left USX's employ. Prior to this change, USX's policy permitted such former employees to accrue continuous service credit only for a period of up to two years.

The October 22, 1984 revision to the leave of absence policy permitted a defined class of persons to receive pension service credit, including the Union negotiators of the Fairfield Works Agreement, Rich and Phillips. This credited pension service enabled Rich and Phillips to obtain "70/80" pensions from USX. In November 1984, the United States Steel and Carnegie Pension Fund, the administrator of the United States Steel Corporation Plan for Employee Pension Benefits (herein the "Pension Fund"), began to make monthly pension payments to Rich, Phillips and certain other Union representatives.

Seventeen months after USX revised and expanded its leave of absence policy, the United States Court of Appeals for the Third Circuit, whose jurisdiction encompasses the location of USX's Pittsburgh, Pennsylvania, headquarters, issued its Opinion in *Trailways Lines, Inc. v. Trailways, Inc. Joint Council of Amalgamated Transit Union,* AFL-CIO, 785 F.2d 101 (3d Cir.), *cert. denied,* 479 U.S. 932 (1986). In *Trailways,* the Third Circuit held that a company violates Section 302 of the Taft-Hartley Act, 29 U.S.C. § 186, if it makes contributions to a joint union-management pension trust fund on behalf of employees

who took leaves of absence to accept full-time positions with the contracting union or its parent international.[1]

The issuance of the *Trailways* decision raised the possibility that USX's amended leave of absence policy might be held to violate 29 U.S.C. § 186 and, as a result, caused USX to reexamine that policy. In May of 1987, USX rescinded the 1984 revision to its leave of absence policy. Subsequently, USX's Pension Fund began to pay the pensions accrued as a result of the 1984 policy, including the pensions of Rich, Phillips and the other Union officials, into an escrow account.

Although USX had advised the President of the International Union of the change in its leave of absence policy, the Union-represented employees at Fairfield Works were apparently unaware that Rich and Phillips had received pensions from USX. Upon learning that a USX policy change had resulted in pensions to the Union negotiators of the Fairfield Works Agreement, a group of union-represented employees from Fairfield commenced an action against USX, its Pension Fund, and the Steelworkers International Union in the United States District Court for the Northern District of Alabama.

2. **District Court Proceedings.** The plaintiffs in this case are present and former bargaining unit employees at USX's Fairfield Works. Plaintiffs' claims, while stated in five separate counts, were all based upon, or grew out of,

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[1] 29 U.S.C. § 186 prohibits, with certain exceptions, agreements to pay or payments by an employer of "money or other thing of value" to any union official or employee. 29 U.S.C. § 186(a). The statute likewise prohibits, with certain exceptions, the request for, or acceptance of, "money or other thing of value" from an employer by any union official or employee. 29 U.S.C. § 186(b). Violation of 29 U.S.C. § 186 is a crime punishable by fine and/or imprisonment only when the defendant "willfully violates" its provisions. 29 U.S.C. § 186(d)(2).

events which allegedly took place during the 1983 negotiations of the Fairfield Works Agreement. In essence, Plaintiffs claimed that, during the negotiation of the Fairfield Works Agreement, USX agreed to grant the subject leave of absence credit, and pensions resulting therefrom, to the Union officials in exchange for labor contract concessions. In short, the claim was one of an alleged extortion or bribe in violation of 29 U.S.C. § 186.

Throughout the defense of these claims, USX steadfastly denied that the Company's October 1984 revision of its leave of absence policy, or the payment of pensions resulting therefrom, were the consequences of any bribe or extortion during the Fairfield negotiations. Specifically, USX maintained, *inter alia,* that the subject leave of absence credit/pension payments do not constitute violations of 29 U.S.C. § 186. In this regard, and during the course of pretrial procedures in this case, USX denied Plaintiffs' claims of bribery or extortion and maintained that it believed that its conduct in 1984 was lawful and was intended to be so.

While counsel for USX argued, in one or more submissions to the district court, that USX believed in 1984 that the Company's amended leave of absence policy was lawful, USX repeatedly represented—and the district court so found—that USX did not rely on an advice of counsel defense and would not affirmatively offer any attorney-client communications of any kind in its defense to these claims.

During the course of discovery, USX objected to certain of plaintiffs' discovery requests on the ground that the information sought was protected by the attorney-client privilege. Specifically, plaintiffs sought the production of

attorney-client communications relating to USX's knowledge of the legality of its 1984 amendment to its leave of absence policy. In October of 1989, the plaintiffs filed motions to compel the production of such information.

On November 28, 1990, the district court entered a Memorandum of Opinion, holding that USX had impliedly waived the attorney-client privilege. *See* App. B. The court ruled that, despite USX's express disclaimer of an advice of counsel defense and its disavowal of using any attorney-client communication in its defense, USX had, nevertheless, impliedly waived the privilege. Specifically, the district court found that USX "impliedly 'raise[d] an affirmative defense that makes [its] intent and knowledge of the law relevant'." App. B at 98a, (quoting from *United States v. Exxon Corp.*, 94 F.R.D. 246 (D. D.C. 1981)).

In a December 5, 1990 order implementing its ruling, the district court ordered USX to produce, among other things, certain attorney-client documents which revealed USX's "knowledge of the law." App. C at 127a. The district court also ordered USX to respond to interrogatories insofar as the responses might reflect USX's "knowledge of the law," and similarly ordered USX representatives to answer deposition questions relevant to USX's knowledge with respect to the legality of its leave of absence policy. *Id.*

Thereafter, USX moved for reconsideration of the district court's finding that the attorney-client privilege had been waived with respect to communications bearing on USX's "state of mind." On reconsideration, the court again acknowledged that USX had not pursued an "advice of counsel" defense and did not intend to offer or rely on any attorney-client communications. App. D at 133a. Nevertheless, the district court confirmed its earlier finding of waiver, setting forth and relying upon the implied waiver

test articulated by the United States District Court for the Eastern District of Washington, in its seminal decision of *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975). Specifically, in its January 24, 1991, Memorandum Opinion, the district court below (quoting from *Hearn v. Rhay*) observed:

> "All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense."

See App. D at 134a. The district court found each of these elements to be present here, concluding that USX "injected the issue of its intent and knowledge of the law into this action, and by doing so . . . made the information it gleaned from its attorney advisors relevant to the case." App. D at 134a-135a (footnote omitted).

In the January 24, 1991 reconsideration opinion, the court did grant USX's alternative request for certification under 28 U.S.C. § 1292(b). The Eleventh Circuit Court of

Appeals granted USX's petition for interlocutory appeal on March 13, 1991.[2]

3. **The Decision of the Court of Appeals.** On April 5, 1994, the Court of Appeals for the Eleventh Circuit issued its decision on appeal, affirming the district court's ruling that USX impliedly waived the attorney-client privilege. *See* App. A. In addition, the court of appeals reversed the district court's grant of summary judgment to USX with respect to plaintiffs' RICO and § 301 claims.

On the issue of the attorney-client privilege, the court of appeals adopted the district court's finding that USX's assertion, in legal memoranda, that it believed its policy amendment was lawful when adopted, was sufficient to constitute an implied waiver of the attorney-client privilege. The court of appeals affirmed an implied waiver despite the fact that USX had renounced any intent to assert a defense of advice of counsel and had represented that it would not rely on any privileged communications in its defense.

In its opinion, the court of appeals accepted the district court's statement that "USX's defense . . . necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change." App. A at 65a. Relying on *Hearn v. Rhay*, the court of appeals stated that "USX waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected

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[2] USX and the Fund previously had filed a motion for summary judgment with respect to plaintiffs' RICO and § 301 claims. On December 16, 1991, the district court granted summary judgment in favor of USX and the Fund on both claims. Plaintiffs appealed this ruling to the court of appeals, which consolidated plaintiffs' appeal with the aforesaid appeal brought by USX under 28 U.S.C. § 1292(b).

communications." App. A at 65a. The court expressly cited a number of cases that applied the *Hearn v. Rhay* fairness analysis. Finally, the court of appeals purported to adopt the rationale of the Second Circuit in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir.), *cert. denied*, ____ U.S. ____, 112 S.Ct. 63 (1991), wherein that court held that an implied waiver of the attorney-client privilege occurs when a defendant asserts "good faith" as a defense.

Based upon its application of *Bilzerian* and the *Hearn v. Rhay* analysis, the court of appeals concluded that USX had waived the attorney-client privilege by injecting the issue of its knowledge of the law into the case. USX challenged the court of appeals' determination by filing a timely petition for rehearing and suggestion of rehearing en banc. By Order dated August 19, 1994, the court of appeals denied USX's petition. *See* App. E.

In this petition, USX seeks review of the decision of the Eleventh Circuit that makes it the first and only court of appeals to find an implied "state-of-mind" waiver of the attorney-client privilege based solely on assertions in legal memoranda that a party believed its actions were legal when taken.

REASONS FOR GRANTING THE WRIT

The decision of the court of appeals has done serious harm to the viability of the attorney-client privilege and plainly conflicts with decisions of other circuit courts that have expressly addressed the issue of an implied waiver. The court's finding of a "state of mind" waiver of the attorney-client privilege solely because a party asserts in legal memoranda that it believed its conduct was legal directly conflicts with decisions of the Third Circuit and the District of Columbia Circuit. Moreover, the decision

below has expanded the confusion throughout the federal courts surrounding the circumstances that must prevail before an implied waiver will be found. This polarizing uncertainty should not exist on so important and basic a question as a party's entitlement to the attorney-client privilege.

In addition to the conflict created by the opinion below, this important and recurring issue is independently worthy of review. Indeed, the holding of the court of appeals so significantly impairs the very purpose of the privilege that it is difficult to rationalize that holding with this Court's repeated pronouncements regarding the importance of the societal interests and goals served by the privilege. This petition presents an issue of significant systemic injury as well as injury to USX which will be incapable of subsequent remedy.

The decision of the court of appeals raises an issue of recurring significance and has resulted in a circumstance where the availability of the attorney-client privilege has little to do with the nature of the attorney-client communication or upon the use (or abuse) of the privilege. In sum, the opinion below directly conflicts with the decisions of other courts of appeals and presents an important question of federal law that has not been, but should be, settled by this Court.

I. There Exist Direct Conflicts In The Circuit Courts, And A Total Lack Of Uniformity Throughout The Federal Court System, On The Issue Of A "State Of Mind" Waiver Of The Attorney-Client Privilege.

The court of appeals below found, as did the district court, that USX did not advance an advice of counsel defense and did not intend to rely upon any attorney-client

communication in its defense. Nevertheless, in reliance upon *Hearn v. Rhay* and its progeny, the court of appeals held that USX's privileged communications were discoverable because they were relevant to USX's "state of mind." Specifically, the court found that USX's "good faith defense" (*i.e.*, that it believed its revised leave of absence policy was legal when adopted) "necessarily implicates all of the information at its disposal when it made its decision to change the leave of absence policy." App. A at 65a. According to the Eleventh Circuit, such an implied waiver can result from nothing more than argument of counsel in legal memoranda, regardless of whether any privileged communications are relied upon or implicated. Although USX argued below, and maintains in this petition, that it was **plaintiffs'** allegations of intentional and criminal wrongdoing, not USX's defense, that placed USX's state of mind at issue, the holding below is, in either circumstance, in direct conflict with holdings of other courts of appeals.

The decision below creates at least two distinct and direct conflicts with decisions of other courts of appeals. First, the decision creates an irreconcilable conflict among the circuits on the fundamental question of whether there exists, in law, any such "state of mind" implied waiver of the attorney-client privilege. Second, even among those circuits that recognize the existence of such an implied waiver, the decision is in direct conflict with respect to the circumstances under which such a state of mind waiver will be found.

A. The Direct Conflict Among The Courts Of Appeals Over The Very Existence Of A "State Of Mind" Waiver.

On the fundamental question of whether there even exists, in law, a "state of mind" implied waiver of the attorney-client privilege, the Eleventh Circuit's holding is in direct and irreconcilable conflict with the decision of the Third Circuit Court of Appeals in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 1994 WL 451310 (3d Cir. 1994). *Rhone* was an insurance coverage case where the plaintiffs sought a declaration of coverage relating to certain underlying AIDS-related claims which had been filed against the plaintiffs. Material to the coverage issue presented in *Rhone* was, *inter alia*, whether, when plaintiffs obtained coverage, they had knowledge of the probability of the AIDS-related claims. The district court held that, in filing the action for insurance coverage, plaintiffs put in issue their state of mind regarding the knowledge they had as to potential AIDS-related claims and thereby waived the attorney-client privilege as to such matters. *Rhone*, 32 F.3d at ____, 1994 WL 451310, at *7. The Third Circuit reversed, flatly rejecting *Hearn v. Rhay* and its progeny and expressly holding that a party **does not** lose the attorney-client privilege when his or her state of mind is put in issue in the action.

In *Rhone*, after acknowledging the traditional waiver cases involving the privilege holder's reliance upon advice of counsel or reliance upon a privileged communication, the Third Circuit observed:

> In these cases, the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue. Courts have found that by placing the advice in issue, the client has

> opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication. *North River Insurance Company v. Philadelphia Reinsurance Corporation,* 797 F. Supp. 363, 370 (D.N.J. 1992); *Pittston Company v. Allianz Insurance Co.,* 143 F.R.D. 66, 71 (D.N.J. 1992).

32 F.3d at ____, 1994 WL 451310, at *11.

The Third Circuit went on to expressly reject the "state of mind" waiver holdings with the following analysis:

> Some decisions have extended the finding of a waiver of the privilege to cases in which the client's state of mind may be in issue in the litigation. These courts have allowed the opposing party discovery of confidential attorney client communications in order to test the client's contentions. *See, e.g., Byers v. Burleson,* 100 F.R.D. 436 (D.D.C. 1983); *Hearn v. Rhay,* 68 F.R.D. 574 (E.D. Wash. 1975). These decisions are of dubious validity. While the opinions dress up their analysis with a checklist of factors, they appear to rest on a conclusion that the information sought is relevant and should in fairness be disclosed. Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, and that remains the case even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of an issue.

Id.

In *Rhone*, the Third Circuit held that a "state of mind" waiver is fundamentally at odds with the basic and long-standing purpose of the attorney-client privilege as follows:

> As the attorney client privilege is intended to assure a client that he or she can consult with counsel in confidence, finding that confidentiality may be waived depending on the relevance of the communication completely undermines the interest to be served. Clients will face the greatest risk of disclosure for what may be the most important matters. Furthermore, because the definition of what may be relevant and discoverable from those consultations may depend on the facts and circumstances of as yet unfiled litigation, the client will have no sense of whether the communication may be relevant to some future issue, and will have no sense of certainty or assurance that the communication will remain confidential.
>
> A party does not lose the privilege to protect attorney client communications from disclosure in discovery when his or her state of mind is put in issue in the action. While the attorney's advice may be relevant to the matters in issue, the privilege applies as the interests it is intended to protect are still served by confidentiality.

32 F.3d at ____, 1994 WL 451310, at *12.

The holding of the Third Circuit in *Rhone* could not be more directly in conflict with the Eleventh Circuit's holding in the instant case. After *Rhone*, there can be no doubt that there exists no "state of mind" exception to the attorney-client privilege in the Third Circuit. There can be no implied waiver of the privilege merely because there may exist, with respect to a litigant's claim or assertion in

the case, some attorney communication that might be relevant to or otherwise affect the litigant's state of mind. To the contrary, the attorney-client privilege will be waived in the Third Circuit only where the litigant asserts a claim or defense **and discloses or describes a privileged communication in support of that claim or defense.**[3]

Also in direct conflict with the court of appeals' opinion below is the decision of the District of Columbia Circuit Court of Appeals in *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989). That case involved a claim that the defendant White defrauded the United States by placing a government official on the payroll of a private firm. Defendant White, as USX in the present case, denied that he had any unlawful intent. As noted by Judge, now Justice, Ginsburg, defendant White **"maintained that he believed the arrangement with Finotti was legal** because Finotti reported having received permission from his superiors. Transcript, Vol. IIA, at 45." *Id.* at 270 (emphasis added). Notwithstanding White's assertion of his **belief** in the legality of his conduct, the D.C. Circuit found no waiver of the attorney-client privilege. In reaching that conclusion, the court stated:

> A rule thus forfeiting the privilege upon denial of *mens rea* would deter individuals from consulting with their lawyers to ascertain the legality of contemplated actions; it would therefore undermine the animating purpose of the privilege.

* * *

[3]This position of the Third Circuit is exactly the approach advocated in the scholarly literature on the subject. *See Developments—Privileged Communications*, 98 Harv. L. Rev. 1450, 1637-1643 (1985); Richard L. Marcus, *The Perils of the Privilege: Waiver and the Litigator*, 84 Mich. L. Rev. 1604, 1628-1630 (1986).

> White did not need to introduce any evidence of communications to and from Cannon [his attorney], and he did not do so. *See* Brief for the United States at 15. Indeed, White carefully refrained from relying on any statements of counsel and expressly disavowed any intent to rely on an advice-of-counsel defense. Transcript, Vol. IIB at 8-10.
>
> Instead, as earlier stated, White maintained that he believed the arrangement with Finotti was legal because Finotti reported having received permission from his superiors.

Id. at 270.

The peril to federal litigants as a result of the Eleventh Circuit's decision is squarely presented in this case and with this petitioner. With its principal place of business in Pittsburgh, Pennsylvania, USX is headquartered in the Third Circuit. Yet, USX also has steel producing facilities throughout the United States, including operations within the Eleventh Circuit. Although, under *Rhone,* there clearly exists no "state of mind" exception to the application of the attorney-client privilege in the Third Circuit, USX was found to have forfeited its privilege in Eleventh Circuit litigation solely because of the subjective finding of a "state of mind" waiver by the court below. The application of attorney-client privilege should not turn on the fortuity of the federal circuit in which a party happens to be sued. Such uncertainty is inimical to the federal interest in uniformity and the development of the privilege under Fed. R. Evid., Rule 501. In light of this direct circuit court conflict over the very existence of a "state of mind" waiver to the attorney-client privilege, review by this Court is warranted.

B. The Direct Conflict Among The Courts Of Appeals With Respect To The Circumstances Required To Effectuate An Implied Waiver.

Even in those circuits that have adopted the "state of mind" waiver doctrine, there exist very direct conflicts with respect to the circumstances which must prevail before such a waiver occurs. The Opinion below has exacerbated and expanded that division and confusion.

In the present case, USX emphasized in both the district court and the circuit court that, to the extent that USX's "state of mind" was relevant, the issue of state of mind was first injected into the case by the **plaintiffs,** not by USX. Inasmuch as intent was an essential element of plaintiffs' claim of intentional, criminal wrongdoing, USX's statement, that it believed its conduct was legal when engaged in, was entirely defensive and did not alter the plaintiffs' burden of proof in this case. The Eleventh Circuit did not dispute either of these points. Nevertheless, the court rejected USX's argument that its good faith defense could not give rise to an implied waiver absent some reliance on, or implication of, an attorney-client communication. Instead, the court of appeals was persuaded by the notion that USX "could have denied criminal intent without affirmatively asserting that it believed that its change in pension policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege." App. A at 68a.

The holding of the court of appeals below, as to **how** USX's "state of mind" was "injected" into the case, is directly contrary to the decisions of other courts of appeals that have addressed the matter. In contrast to the rationale

adopted by the Eleventh Circuit, other courts of appeals have assigned controlling significance—on the issue of waiver—to matters such as who **first** injected the issue of "state of mind" and who has the burden of proof with respect to that issue. Specifically, the opinion below is in direct conflict with the application of the "at issue" doctrine as set forth in decisions of the Courts of Appeals for the Fifth, Seventh, and District of Columbia Circuits.[4]

In *United States v. White, supra,* for example, the District of Columbia Circuit expressly addressed the impact of a defendant's good faith defense to the essential intent element of the charge brought against him. In contrast with the approach adopted by the court of appeals below, the court in *White* stated,

> Intent is an element of the offense the government must prove. It was White's constitutional right to put the government to its proof on all the elements of the offense. . . . To penalize him for exercising this right by holding that he waived his attorney-client privilege would cut short both the privilege and the right.

887 F.2d at 270 (citation omitted).

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[4]The court of appeals' holding is an application of what has come to be known as the "at issue" doctrine first announced in *Hearn v. Rhay* and quoted, *supra,* at 8. As noted above, both the district court and the Eleventh Circuit expressly relied upon the above-quoted *Hearn v. Rhay* formulation of that doctrine. For academic and judicial criticism of the *Hearn v. Rhay* formulation and the expansive "state of mind" waiver cases, *see, for example, Developments—Privileged Communications,* 98 Harv. L. Rev. 1450, 1637-1643; Richard L. Marcus, *The Perils of the Privilege: Waiver and the Litigator,* 84 Mich. L. Rev. 1605, 1628-1630; *Remington Arms Co. v. Liberty Mut. Ins. Co.,* 142 F.R.D. 408 (D. Del. 1992); *Hewlett-Packard Co. v. Bausch & Lomb, Inc.,* 115 F.R.D. 308, 311-12 (N.D. Cal. 1987); *Allen v. West Point-Pepperell Inc.,* 848 F. Supp. 423, 428-31 (S.D.N.Y. 1994).

Similarly, the decision of the Court of Appeals for the Fifth Circuit in *In Re Burlington Northern, Inc.* 822 F.2d 518 (5th Cir.), *cert. denied sub nom.*, 484 U.S. 1007 (1988), is also directly contrary to the opinion below. In *Burlington Northern*, the Fifth Circuit refused to find an implied waiver of the attorney-client privilege when a defendant, without implicating any specific attorney-client communication, raised a defense under the *Noerr-Pennington* doctrine to an antitrust claim asserted against it. The Fifth Circuit held:

> A defendant who relies on *Noerr-Pennington* merely denies the existence of an antitrust violation. . . . We do not see how it can be said that the [defendants] waived their privilege when it is [plaintiff] who filed this lawsuit and seeks to rely on attorney/client communications and work product to prove its claim.

822 F.2d at 533 (citations omitted). *Accord, Lorenz v. Valley Forge Ins. Co.*, 815 F.2d 1095 (7th Cir. 1987) (To waive the attorney-client privilege by voluntarily injecting an issue in the case, a defendant must inject a new factual or legal issue into the case that is outside the scope of plaintiff's prima facie case.)

The confusion and division among the courts of appeals as to **how** a party's state of mind is injected into the case is best illustrated by a comparison of the holding of the Eleventh Circuit here with the decision of the Second Circuit Court of Appeals in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir. 1991)—a case expressly relied upon by the court below.

In apparent accord with the decision of the court of appeals here, the Second Circuit in *Bilzerian* held that, "Bilzerian's own testimony as to his good faith would open the door to cross-examination, possibly including inquiry

into otherwise privileged communications with his attorney." *Id.* at 1293. Yet, the implied waiver found below cannot be reconciled with the holding in *Bilzerian.* In the instant case, the court of appeals found an implied waiver as a result of argument by counsel in legal memoranda that USX believed its policy was legal when adopted. In *Bilzerian,* the Second Circuit expressly indicated that, while the defendant's "own testimony as to his good faith" would result in a finding of an implied waiver, the "[d]efendant was free . . . to argue his good faith defense by means of defense counsel's opening and closing statements and by his examination of witnesses." 926 F.2d at 1293. Accordingly, even in the Second Circuit, no implied waiver would have been found on the facts presented below.

In addition to the aforementioned circuit court conflicts, as might be expected, there is complete disarray in the decisions of the district courts on this implied waiver issue.[5] These conflicts exist not only between trial courts in

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[5]The confusion on this issue is evidenced by the widely divergent approaches employed by the federal courts. As noted, a number of courts have applied the *Hearn v. Rhay* analysis. *See, e.g., Bieter Co. v. Blomquist,* 156 F.R.D. 173, 177 (D. Minn. 1994) (citing *Hearn* and concluding that "primary reason" for finding waiver was the fact that the documents at issue were necessary for a party's defense); *see also* cases discussed in text. Other courts have expressly limited *Hearn. See Remington Arms Co. v. Liberty Mut. Ins. Co.,* 142 F.R.D. 408, 415 n.6 (D.Del. 1992) (discussing numerous decisions which have sought to restrict *Hearn*). Still other courts have rejected *Hearn* outright. *See* cases discussed in text. Courts which have cited *Hearn* have held that there can be no waiver where a party disclaims any intention of relying upon an advice of counsel defense and can present its defense without disclosing any attorney-client communications. *See, e.g., In re Int'l Harvester's Disposition of Wisconsin Steel Litigation,* 666 F. Supp. 1148, 1151 (N.D. Ill. 1987). Finally, other courts have adopted portions of the *Hearn* formulation while rejecting others. *See Koppers Co. v. Aetna Cas. and Sur. Co.,* 847 F. Supp. 360, 363-64 (W.D. Pa. 1994) (expressly

(Continued on next page)

different circuits, but also between district courts within the same circuit. For example, in *Allen v. West Point-Pepperell Inc.*, 848 F. Supp. 423, 429 (S.D.N.Y. 1994), the district court observed: "*Hearn* and its progeny has recently been the subject of significant legal and academic criticism .... The tension among the foregoing policy considerations surrounding implied waiver of the privilege exists within this Circuit as well, where the boundaries of implied waiver have been the subject of conflicting opinion." *See also Remington Arms Co. v. Liberty Mut. Ins. Co.*, 142 F.R.D. 408, 413 (D. Del. 1992) ("Courts' statements of what constituted issue injection began to become more liberal and often came to resemble a general balancing test with reliance on *Hearn v. Rhay* .... Expansive applications of implied waivers, however, have led to substantial academic criticism, which courts upon mature reflection have begun to adopt.").

In sum, there exists a dramatic lack of uniformity throughout the federal court system on the issue of an implied "state of mind" waiver of the attorney-client privilege. The importance of the societal interests underlying the attorney-client privilege, and the regularity with which the federal courts face such waiver claims, argues most strongly that this division be settled by this Court.

II. The "State Of Mind" Waiver Found By The Court Of Appeals Presents An Important Question Of Common Occurrence In The Federal Courts.

The fundamental importance of the attorney-client privilege to our system of justice was expressed most

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(Continued)

rejecting *Hearn* but holding that waiver applies where "the likelihood of chilling the type of ordinarily-privileged communication is outweighed by the unfairness to the seeking party if privilege is found.").

clearly by this Court in *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981):

> The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law. 8 J. Wigmore, Evidence § 2290 (McNaughton rev. 1961). Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client.

Any decision which severely restricts the scope of the attorney-client privilege and seriously impairs the societal interests and goals served by the privilege is of inherent importance to our legal system. The holding of the court of appeals here is such a decision.

The "state of mind" waiver adopted by the Eleventh Circuit is a recurring issue on which, as discussed above, the courts of appeals are in conflict. The issue is not one of mere academic interest, nor is it one of isolated or anecdotal occurrence. On the contrary, the issue presented here, in one formulation or another, occurs regularly throughout the federal court system.

To appreciate the expansive scope of the implied waiver doctrine adopted by the court below, and its consequent importance to our system, one need only observe the myriad of circumstances where the privilege is forfeited under such a doctrine. There exists virtually an endless array of situations in which a party may make assertions in litigation which necessarily implicate his "state of mind".

Specifically, and merely by way of example, claims respecting a party's intent in entering a contract,[6] claims of good faith,[7] estoppel,[8] justifiable reliance,[9] and equitable tolling[10] all implicate state of mind. Moreover, the "state of mind" waiver adopted by the Eleventh Circuit seriously erodes the continued vitality of the attorney-client privilege in all commercial litigation in which fraud or reliance (and corresponding state of mind) is an issue.[11] According to the decision of the Eleventh Circuit here, the privilege would be forfeited notwithstanding the privilege holder's disclaimer of any reliance upon any privileged communication. The impact on criminal defendants who seek to affirmatively contest *mens rea* is even more dramatic inasmuch as such a defense inherently involves the party's "state of mind".

Any waiver doctrine which results in the forfeiture of the attorney-client privilege as a consequence of very common and routine litigation claims works a devastating impact upon the purposes underlying the privilege. As this Court has observed, we exist in a vast and complicated arena of laws and regulations where, frequently, compliance with the law is hardly an instinctive matter. *See Upjohn v. United States, supra,* 449 U.S. at 392, and *United States v. United States Gypsum Co.,* 438 U.S. 422, 440-41

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[6] *Zenith Radio Corp. v. United States,* 588 F. Supp. 1443 (Ct. Int'l Trade 1984), *rev'd,* 764 F.2d 1577 (Fed. Cir. 1985).

[7] *United States v. Exxon Corp.,* 94 F.R.D. 246 (D.D.C. 1981).

[8] *Southwire Co. v. Essex Group, Inc.,* 570 F. Supp. 643 (N.D. Ill. 1983).

[9] *Chase Manhattan Bank v. Drysdale Sec. Corp.,* 587 F. Supp. 57 (S.D.N.Y. 1984).

[10] *Russell v. Curtis Matheson Scientific, Inc.,* 493 F. Supp. 456 (S.D. Tex. 1980).

[11] *Sedco Int'l, S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.), *cert. denied,* 459 U.S. 1017 (1982).

(1978). As such, there obviously exist very important personal and societal interests in encouraging individuals to consult with attorneys to maximize compliance with the law. The expansive waiver theory adopted by the Eleventh Circuit, however, does just the reverse. It produces an environment where parties who enter into a transaction may have to restrain themselves from free and frank communications with their attorneys in the realization that their confidences may be revealed if litigation on the transaction were to ensue. Indeed, in certain circumstances it places a premium on the avoidance of legal advice altogether.[12]

The Eleventh Circuit's adoption of the expansive *Hearn v. Rhay* analysis does an additional disservice to the goals of the attorney-client privilege. Under such an approach, a determination of waiver turns on considerations such as whether the attorney-client communication is "relevant" or whether the privileged matter is "vital" to the opposing party or the trial courts' particular view of "fairness". *Hearn v. Rhay*, 68 F.R.D. at 581-82. Numerous courts and commentators have condemned such a subjective application of the attorney-client privilege.

For example, the Third Circuit observed in *Rhone, supra*, that "Relevance is not the standard for determining whether or not evidence should be protected from disclosure as privileged, . . . even if one might conclude the facts to be disclosed are vital, highly probative, directly relevant or even go to the heart of the issue." 32 F.3d at ____, 1994 WL 45130, at *11. Similarly, a rule of waiver that depends

[12]For a discussion of other systemic costs from such broad attorney-client waiver rules (*e.g.*, increasing litigation costs) *see Marcus, Perils, supra*, at 1607-1616.

upon an opponent's need for access to privileged information would define the privilege by the hazards of fortune (*i.e.*, "the continued existence of one's privilege would depend not on how one has used or abused the privilege, but rather on who one's adversary happens to be." *Developments*, 98 Harv. L. Rev. at 1641). The attorney-client privilege is an absolute privilege that has been instituted on the basis of a **systemwide** balancing of the costs and benefits. A party's entitlement to the attorney-client privilege should not turn on a particular trial judge's sense of the equities.[13]

The critical importance presented by the issue here is the uncertainty and unpredictability created by the Eleventh Circuit's opinion. The conflict created by the Eleventh Circuit's decision below, coupled with the *ad hoc* determination and case-by-case "balancing" adopted by

[13]Academicians and legal scholars have correctly observed the absence of any principled rationale in the *Hearn v. Rhay* waiver test. Specifically as to the "fairness" element, the *Hearn v. Rhay* test does not target any type of unfairness that is not indistinguishable from the unavoidable unfairness generated by every assertion of privilege. *Developments—Privileged Communications*, 98 Harv. L. Rev. at 1642. ("First, even though evidence of an attorney's advice might be dispositive of a good faith defense, permitting the privilege to shield such evidence would create unfairness that is traceable merely to 'incompleteness': the court would have to decide the question of good faith in the absence of some probative evidence. This type of incompleteness is the same as that caused whenever a party raises a privilege and forces a court to decide a factual question without examining all the relevant evidence"). *Accord*, Marcus, *Waiver and the Litigator*, 84 Mich. L. Rev. at 1632 n.147 ("It might be argued that there is connection between the fairness concerns and the triggering events because the privilege-holder is likely to testify about this subject, thereby raising truth-garbling concerns unless access to privileged material follows. This argument is not persuasive because it could apply to any litigant who offers evidence on an issue while simultaneously invoking the privilege."). *Accord, Remington Arms*, 142 F.R.D. at 415; *North River Ins. Co. v. Philadelphia Reinsurance Corp.*, 797 F. Supp. 363 (D.N.J. 1992).

the court, is directly at odds with this Court's emphasis on the vital role of **certainty** in the application of the privilege. As this Court observed in *Upjohn*, 449 U.S. at 393:

> But if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected. An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all.

The waiver analysis adopted by the Eleventh Circuit will produce widespread forfeitures of the privilege in common circumstances and leave individuals highly uncertain as to whether any communication with counsel will ultimately remain confidential. Indeed, individuals will have legitimate reason to affirmatively avoid seeking the advice of counsel in circumstances where it is in their, and society's, best interests for advice to be sought. Such an approach cannot be reconciled with the steadfast protection of confidential attorney-client communications by this Court.

If this petition is not granted, USX will suffer harm that cannot be remedied, even if USX prevailed in an appeal after judgment. *In re von Bulow*, 828 F.2d 94, 98-99 (2d Cir. 1987). Moreover, the extraordinary limitation on the scope and application of the attorney-client privilege announced below, and the stark judicial conflict it creates, threatens the very viability of the privilege by enveloping its application in uncertainty and unpredictability. This important issue of federal law argues most strongly for review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

LESLIE RAY COX; R.M. COX; LARRY DRIVER; BARRY NICHOLS; JOHN BULLARD; ROBERT W. KENNEDY, JR.; LORENZO G. EAST; CLARENCE M. POPE, JR.; C.R. ALTES; JACK E. MERRYMON; TERRY P. WEST; R.S. ARNOLD; M.W. MILSTEAD; J.W. WADE; MANNING A.C. SNIDER; TERRY H. MELVIN; THOMAS E. HILL; GARY D. SWANN; RONALD E. FRAZIER; ANTHONY J. CRAPET; ROBERT M. GREEN; HEATH L. MCMEANS, III; BILLY CARTER; JOE A. KNIGHT, GEORGE BOGLIN, WARDELL CLARK, PHILLIP L. DRUMMOND, DON L. FLURRY, DENNIS R. FULTON, DENNIS E. JONES, W.T. MAYBERRY, JAMES R. MILLER, WILLIE J. NATION, OSCAR LEE PERRY, ROBERT POOLE, BRACK WELLS, WILLIE YOUNG, HARRY S. TURNER,

Plaintiffs-Appellees, Cross-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE AND UNITED STATES STEEL & CARNEGIE PENSION FUND,

Defendants,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,

Defendants-Appellants, Cross-Appellees.

LESLIE RAY COX, R.M. COX, LARRY DRIVER, BARRY NICHOLS, JOHN BULLARD, ROBERT W. KENNEDY, JR., LORENZO G. EAST, CLARENCE M. POPE, C.R. ATLES, JACK E. MERRYMON, TERRY P. WEST, R.S. ARNOLD, M.W. MILSTEAD, J.W.

WADE, A.C. SNIDER, TERRY H. MELVIN, THOMAS E. HILL, GARY D. SWANN, RONALD E. FRAZIER, ANTHONY J. CRAPET, ROBERT M. GREEN, HEATH L. MCMEANS, III, BILLY CARTER, JOE A. KNIGHT, GEORGE BOGLIN, WARDELL CLARK, PHILLIP L. DRUMMOND, DON L. FLURRY, DENNIS R. FULTON, DENNIS E. JONES, W.T. MAYBERRY, JAMES R. MILLER, WILLIE J. NATION, OSCAR LEE PERRY, ROBERT POOLE, BRACK WELLS, WILLIE YOUNG, HARRY S. TURNER,

Plaintiffs-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE, UNITED STATES STEEL & CARNEGIE PENSION FUND, USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,

Defendants-Appellees.

Nos. 91-7215, 92-6218

United States Court of Appeals,
Eleventh Circuit

April 5, 1994

Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, District Judge.

CARNES, *Circuit Judge:*

This case arises out of the negotiations between the USX Corporation ("USX" or "the Company"), formerly

*Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

known as United States Steel, and the United Steelworkers of America ('the Union') leading to the 1983 Collective Bargaining Agreement governing operations at the USX steel mill in Fairfield, Alabama ("the Fairfield Works"). The plaintiffs-appellees, who are or were Union members and employees at the Fairfield Works, brought this suit against USX, the administrator of the United States Steel and Carnegie Pension Fund ("the Fund"), and the Union, alleging that the Union negotiators covertly requested and received pension benefits from the Company to which they were not entitled and that, as a result, the Union negotiators agreed to concessions that damaged the plaintiffs. The district court granted summary judgment to the defendants on several of the plaintiffs' claims, and certified its decision for appeal. We review that decision, along with several of the court's rulings on discovery matters.

In part I, we discuss the facts and prior proceedings of the case as background. In part II, we review the district court's grant of summary judgment for the defendants and explain why we reverse that ruling. More specifically, we discuss the standard of review in subpart A, then we analyze the plaintiffs' RICO claim in subpart B and, in subpart C, their breach of contract claim against USX under § 301 of the Labor Management Relations Act, 29 U.S.C.A. § 185 (1978 & Supp. 1993). In part III, we review various rulings of the district court on discovery. After explaining in part IV our lack of jurisdiction to review the district court's decision not to certify a plaintiff class as to the claim for equitable relief, we conclude in part V.

I. BACKGROUND

The Fairfield Works steel mill in Jefferson County, Alabama, had been closed, and its approximately 2,600

employees laid off, for over a year when, in September 1983, USX and the Union sought to reach an agreement under which the mill could be reopened. William Miller, USX Vice President for Labor Relations, headed the USX negotiating team. The Union was represented by Thermon Phillips, a member of the Union's International Executive Board and Director of District 36 (which includes Alabama) and by E.B. Rich, a sub-director of District 36. Both Phillips and Rich had left USX to work for the Union years before; neither had been with the Company long enough to qualify for a pension.

The plaintiffs allege that shortly after the negotiations began, Rich took Miller aside and gave him a note demanding that the Company grant retroactive leaves of absence to a few specified Union representatives (including themselves), so that the years they had spent working for the Union would be counted for pension purposes as years spent with USX and they would therefore become eligible for USX pensions. According to the plaintiffs, the Union negotiators surreptitiously informed Miller that their agreement to any concessions at Fairfield was conditioned on their receiving Company pensions.

The final Fairfield Works Agreement ("the Agreement" or "FWA"), reached on Christmas Eve, 1983, did include sizable concessions, although the Union argues that USX acceded to numerous Union demands before the Agreement was reached, and USX argues that in return for Union concessions it committed itself to making substantial capital investments to modernize the mill. Under the Agreement, more than 500 jobs were eliminated; local working conditions rules (governing such matters as job

assignments and crew sizes) were abolished altogether, giving the Company sole discretion in determining job assignments; all pending complaints, grievances, and arbitration cases were dismissed; maintenance and janitorial jobs were contracted out; and salary guarantees and certain types of incentive pay were dropped. Towards the end of the negotiations, one USX official estimated that the Agreement would yield savings of 23.5 million dollars per year. The plaintiffs assert that Rich and Phillips refused to sign the final agreement until USX covertly agreed to their pension demands. Miller testified in deposition that the Union negotiators signed the Agreement after he told them that he was under the impression that their pension request "would be considered favorably" but that he "could not assure them of that."

In 1984, after the Agreement went into effect, Rich contacted USX numerous times to inquire about the status of the pension request. In the fall of 1984, the USX Corporate Policy Committee approved a unilateral change in policy to allow approval of indefinite retroactive leaves of absence for former employees who had left to work for the Union. J. Bruce Johnston, Executive Vice President of Employee Relations, proposed the change, writing to the Committee that "it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the [Union]." Shortly thereafter, the Company approved pensions for six of the Union officials that Rich had named during the negotiations (referred to by some as the "Fairfield Six"), including Rich and Phillips themselves.[1] Thus, Rich and Phillips received for themselves and for others that which they had

[1] The other members of the Fairfield Six are Ralph Gurley, Carl Statum, Virgil Pearson, and Fred Shepard.

covertly demanded during the negotiations. In November 1984, USX began paying the Fairfield Six their pensions, which were awarded retroactively to February 29 of that year. However, USX did not directly inform the potential beneficiaries, other than the Fairfield Six, of the change in its leave-of-absence policy. In March 1985, Johnston did write a letter to Union president Lynn Williams, informing him that "United States Steel's procedure was revised so that Leaves of Absence applied for by International Union Representatives may be permitted for longer periods than those established in the Labor Agreement, in designated circumstances, at the discretion of the Company on a case-by-case basis." The letter also stated that, "[p]ursuant to the above policy, we have approved requests for Leaves for six (6) International Union Representatives." The Union apparently did not inform any of its other representatives or members of the change in policy, so that the Fairfield Six were the only ones who received pensions under the new policy.

In May 1988, after several other Union representatives heard rumors of the benefits the Fairfield Six were receiving, and applied for similar pensions, the United States Steel Fund sent a letter to the Fairfield Six informing them that it would begin depositing their benefits into escrow accounts. According to the letter, recent decisions by the Second, Third, and Fifth Circuits "raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union officials to receive credit for pension purposes for extended periods they spend in the service of the Union." The letter explained that "in light of current legal developments," continued payment of the benefits could subject the Fairfield Six, USX, and the Fund "to criminal liability."

In 1990, as a result of their actions concerning the negotiations and pensions, USX, Rich, and Phillips were convicted of violating 29 U.S.C.A. § 186 (1978 & Supp. 1993). Subsection (a) of that statute prohibits "any employer" from paying, lending, or delivering "any money or thing of value" to "any representative of any of his employees who are employed in an industry affecting commerce." 29 U.S.C.A. § 186(a)(1) (1978 & Supp. 1993). Subsection (b) makes it "unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section." 29 U.S.C.A. § 186(b)(1) (1978 & Supp. 1993). The appeal of those convictions is pending before this Court.

Thirty-eight present and former USX employees brought this suit in the Northern District of Alabama, seeking monetary damages and equitable and declaratory relief for a class of similarly situated workers. The final amended complaint asserted five claims against USX, the Fund, and the Union. Count One alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. §§ 1961 *et seq.* Count Two alleged that the Union breached its duty of fair representation, and that the Company breached its contractual duties, in violation of the Labor Management Relations Act (LMRA) § 301, 29 U.S.C.A. § 185(a). Count Three alleged that USX and the Union committed an unfair labor practice in violation of the National Labor Relations Act (NLRA), 29 U.S.C.A. §§ 151 *et seq.*, by failing to negotiate in good faith. Count Four alleged that the defendants violated their fiduciary duties under the Employee Retirement Income Security Act (ERISA), 29 U.S.C.A. §§ 1001 *et seq.*, by failing to notify the plaintiffs or the Department of

Labor of the change in the Company's leave policy. Finally, Count Five alleged violations of 29 U.S.C.A. § 186, and sought an order enjoining the defendants from future violations.

The district court certified a plaintiff class, with respect to the damages claims only, of all those who were employed by USX in Jefferson County, Alabama, and represented by District 36 of the Union at any time between July 1, 1983, and August 14, 1990. The court, citing "the substantial conflicts within the class" over the plaintiffs' request that the Agreement be rescinded, declined to certify a plaintiff class with respect to the plaintiffs' claims to equitable relief. During the course of discovery, the plaintiffs deposed Lynn Williams, president of the International Union, and asked him about the letter he had received from J. Bruce Johnston in March of 1985, informing him of USX's change in the leave-of-absence policy. Williams testified that he made no inquiry upon receiving the letter, but "had some conversation about it" with the Union's attorneys. Plaintiffs' counsel then asked Williams "What did you say and what did they say on that occasion about the March 5, 1985 letter?" The Union's counsel instructed Williams not to answer on the ground that the information sought was protected by the attorney-client privilege. After the plaintiffs moved for an order compelling Williams to respond to the question, the district court determined that the answer was discoverable and, on January 10, 1991, ordered that Williams answer. The court then certified the Union's appeal from that order, and we granted the Union's petition for permission to appeal.

Also during the course of discovery, USX objected to some of the plaintiffs' deposition questions, document

requests, and interrogatories, on the ground that the information sought was protected by the attorney-client privilege. When the plaintiffs filed a motion to compel USX to respond, the district court determined that USX, by asserting the defense that it had intended to act in compliance with the law, waived the privilege with respect to those communications bearing on the question of USX's intent in awarding pension credits to Union officials. Accordingly, the court granted the plaintiffs' motions to compel USX to produce materials bearing on USX's knowledge of the legality of its actions. The district court certified USX's appeal from that order, and we granted USX leave to appeal, consolidating the two discovery appeals into one and giving it number 91-7215.

The district court granted the defendants' motion for summary judgment on the plaintiffs' claims under RICO and claims under LMRA § 301 against both USX and the Union, on the ground that the plaintiffs had failed to show that the discussions about pension credits had caused them any injury. The district court dismissed the unfair labor practice claim on the ground that the National Labor Relations Board has exclusive jurisdiction over such claims. The district court also granted the Union's motion for summary judgment on the plaintiff's ERISA claim against the Union. The district court entered final judgment on those claims as to which summary judgment was granted, with the exception of the claim against the Union for violation of the duty of fair representation under LMRA § 301, which is therefore not before this Court. In appealing that final judgment, the plaintiffs have abandoned the ERISA claim against the Union and NLRA claims. They appeal only the award of summary judgment on the RICO

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claim and the § 301 claim against USX for breach of contract; they also appeal a number of discovery orders the district court entered prior to summary judgment. That appeal bears number 92-6218, and has been consolidated with the discovery appeal, number 91-7215.

II. THE DISTRICT COURT'S GRANT OF SUMMARY JUDGMENT

A. The Standard of Review

We review a "grant [ ] of summary judgment de novo, applying the same legal standard applied by the district court in the first instance." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1117 (11th Cir. 1993). Summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact." Fed.R.Civ.P. 56(c); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986). There is a genuine issue of material fact "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . . . The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.* at 255, 106 S.Ct. at 2513 (citing *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59, 90 S.Ct. 1598, 1608-09, 26 L.Ed.2d 142 (1970)). In other words, "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact, then the court should refuse

to grant summary judgment." *Barfield v. Brierton*, 883 F.2d 923, 933-34 (11th Cir. 1989).

The party seeking summary judgment bears the initial burden of identifying for the district court those portions of the record "which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp.*, 477 U.S. at 323, 106 S.Ct. at 2553. With regard to issues on which the non-moving party bears the burden of proof, the moving party need not support its motion with evidence "negating the opponent's claim." *Fitzpatrick v. City of Atlanta*, 2 F.3d 1112, 1115-16 (11th Cir. 1993) (quoting *United States v. Four Parcels of Real Property*, 941 F.2d 1428, 1437-38 (11th Cir. 1991) (*en banc*)). Once the moving party has carried its burden, the non-moving party must show the existence of a genuine issue of material fact to avoid summary judgment. *Id.*

B. The RICO Claim

The civil provision of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C.A. § 1964(c) (1984 & Supp. 1993), provides that "[a]ny person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee." Thus, to recover on a civil RICO claim, the plaintiffs must prove, first, that § 1962 was violated; second, that they were injured in their business or property; and third, that the § 1962 violation caused the injury. *Avirgan v. Hull*, 932 F.2d 1572, 1577 (11th Cir. 1991), *cert. denied*, _____ U.S. _____, 112 S.Ct. 913, 116 L.Ed.2d 813 (1992). Those who violate § 1962 are

> those who engage in, or aid and abet another to engage in, a pattern of racketeering activity if they also do the following: invest income derived from the pattern of racketeering activity in the operation of an enterprise engaged in interstate commerce (section 1962(a)); acquire or maintain, through the pattern of racketeering activity, any interest in or control over such an enterprise (section 1962(b)); or conduct, or participate in the conduct of, the affairs of such an enterprise through a pattern of racketeering activity (section 1962(c)). Section 1962(d) makes it a crime to conspire to violate sections 1962(a), (b), or (c).

Pelletier v. Zweifel, 921 F.2d 1465, 1495-96 (11th Cir.), *cert. denied*, _____ U.S. _____, 112 S.Ct. 167, 116 L.Ed.2d 131 (1991). "Racketeering activity" includes violations of 29 U.S.C.A. § 186, which restricts the payments for which a union representative can ask and which his employer can give. 18 U.S.C.A. § 1961(1)(C) (1984 & Supp. 1993); 29 U.S.C.A. § 186 (1978 & Supp. 1993).

1. Violation of § 1962

USX argues that the plaintiffs failed to create a genuine issue of material fact about the existence of a violation of § 1962, which is the first element of a civil RICO claim, and the Union has adopted USX's arguments. First, USX argues that the plaintiffs did not proffer sufficient evidence of the existence of a "pattern of racketeering activity." Even as to the allegations, according to the Company, the "[p]laintiffs allege nothing more than a single, uncomplicated episode of alleged wrongdoing in the nature of an alleged 'garden-variety' act of extortion or bribery," and a single act cannot constitute a "pattern." Second, and in the alternative, USX argues that even if the plaintiffs have met

their burden of pleading and have proffered sufficient evidence concerning the existence of a pattern of racketeering activity, they have failed to meet their burden with respect to the other elements required under § 1962(a), (b), or (c). We address these two contentions in turn.

a. The Pattern of Racketeering Activity

A "pattern of racketeering activity," for purposes of the RICO Act, "requires at least two acts of racketeering activity," 18 U.S.C.A. § 1961(5) (1984 & Supp. 1993), and the Supreme Court has observed that "two isolated acts of racketeering activity do not constitute a pattern." *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 496 n. 14, 105 S.Ct. 3275, 3285 n. 14, 87 L.Ed.2d 346 (1985). Instead, " '[i]t is the factor of *continuity plus relationship* which combines to produce a pattern.' " *Id.* (quoting S.Rep. No. 91-617, 91st Cong., 1st Sess. 158 (1969) (emphasis added)). More recently, the Court has expanded on the definition of "continuity" and "relationship." Borrowing from Title X of the Organized Crime Control Act of 1970, the Court has explained that predicate acts are "related" if they "have the same or similar purposes, results, participants, victims, or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *H.J. Inc. v. Northwestern Bell Tel. Co.*, 492 U.S. 229, 240, 109 S.Ct. 2893, 2901, 106 L.Ed.2d 195 (1989) (quoting 18 U.S.C. § 3575(e)). As for 'continuity,' the Court explained:

> "Continuity" is both a closed- and open-ended concept, referring either to a closed period of repeated conduct, or to past conduct that by its nature projects into the future with a threat of repetition. *See Barticheck v. Fidelity Union Bank/First National State,*

> 832 F.2d 36, 39 (CA3 1987). It is, in either case, centrally a temporal concept—and particularly so in the RICO context, where what must be continuous, RICO's predicate acts or offenses, and the *relationship* these predicates must bear one to another, are distinct requirements. A party alleging a RICO violation may demonstrate continuity over a closed period by proving a series of related predicates extending over a substantial period of time. Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement . . .

Id. at 241-42, 109 S.Ct. at 2902.

We have held that "[a]cts that are part of the same scheme or transaction can qualify as distinct predicate acts," *Bank of America v. Touche Ross & Co.*, 782 F.2d 966, 971 (11th Cir. 1986), as long as "each act constitutes a separate violation of the state or federal statute governing the conduct in question," *United States v. Watchmaker*, 761 F.2d 1459, 1475 (11th Cir. 1985) (internal quotations omitted), *cert. denied*, 474 U.S. 1100, 106 S.Ct. 879, 88 L.Ed.2d 917 (1986). " 'If distinct statutory violations are found, the predicate acts will be considered to be distinct *irrespective of the circumstances* under which they arose.' " *United States v. Gonzalez*, 921 F.2d 1530, 1545 (11th Cir. 1991) (quoting *Bank of America*, 782 F.2d at 971).

As the district court properly recognized, that which USX argues is a single episode of bribery could be viewed by a jury as a scheme consisting of multiple violations, sufficiently interrelated and continuous to constitute a pattern of racketeering activity. Each monthly payment of pension benefits to the Fairfield Six could be interpreted as a "thing of value" for purposes of 29 U.S.C.A. § 186, and therefore as a separate predicate act for purposes of RICO.

See, e.g., United States v. Boffa, 688 F.2d 919, 935-36 (3d Cir. 1982) (holding that a reasonable jury could find that each monthly lease payment made to secure use of an automobile for a union official for four months constituted a separate predicate act under RICO), *cert. denied*, 460 U.S. 1022, 103 S.Ct. 1272, 75 L.Ed.2d 494 (1983). The jury could easily determine from the proffered evidence that the payments are connected by a common scheme, plan, or motive, and therefore satisfy the relatedness requirement.

USX made payments to the Fairfield Six over a period of three and one-half years (from December 1984 to May 1988). This case is therefore unlike *Aldridge v. Lily-Tulip, Inc.*, 953 F.2d 587 (11th Cir. 1992), in which we held that a fraud requiring the use of the mails for six months "was accomplished in too short a period of time . . . to qualify as a pattern of racketeering activity." *Id.* at 593. Furthermore, as the district court observed, a reasonable jury could find that the defendants carried on racketeering activity during the 1983 negotiations, when the Union negotiators made the illegal request, and throughout 1984, when the pensions were established. That period of time is sufficiently long for a reasonable jury to conclude that the plaintiffs established closed-ended continuity.

b. The Other Requirements of § 1962

USX argues in the alternative that even if the jury could find that the defendants engaged in a pattern of racketeering activity, the award of summary judgment against the plaintiffs should be upheld because there is no genuine issue of material fact that the additional elements required for criminal liability under the various subsections of § 1962 exist. We disagree.

Under § 1962(c) it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." USX argues that a jury could not find a violation of that subsection because USX cannot be both the "person" and the "enterprise" contemplated by § 1962(c). In *United States v. Hartley,* 678 F.2d 961, 986 (11th Cir. 1982), a panel of this Court held "that a corporation can simultaneously be named as a defendant and satisfy the 'enterprise' requirement." (Emphasis added). USX argues that we should reverse that position. That, of course, we cannot do, because "[t]his panel is bound by the decisions of prior panels of the Eleventh Circuit unless overruled by the *en banc* court or the Supreme Court." *Pollgreen v. Morris,* 911 F.2d 527, 534 (11th Cir. 1990). Under *Hartley,* a reasonable jury could conclude that the defendants violated § 1962(c); we therefore need not reach the plaintiffs' counter-arguments that the jury could find violations of § 1962(a), (b), or (d), or that the jury could find a violation of § 1962(c), even if *Hartley* is rejected, because the jury could find that the Fairfield Works, or the Union, or District 36 of the Union, or the Fund, was the "enterprise" for RICO purposes.

USX also argues that RICO is unconstitutionally vague. In *United States v. Van Dorn,* 925 F.2d 1331, 1334 n. 2 (11th Cir. 1991), this Court found the argument that RICO is unconstitutionally vague to be "completely lacking in merit."

In summary, the plaintiffs have established the first element of a civil RICO claim by producing evidence from which a reasonable jury could conclude that the defendants

violated § 1962(c). Thus, the district court correctly declined to grant summary judgment on the first RICO element. We turn now to causation, the second element of a RICO claim, the ground on which the district court did grant summary judgment for the defendants.

2. Causation

In awarding summary judgment to the defendants on the RICO claim, the district court held that the plaintiffs had failed to show the existence of a genuine issue of material fact as to whether the alleged bribery of the Union negotiators caused injury to the plaintiffs. The court reasoned that the plaintiffs had produced no evidence that the alleged bribes caused any of the concessions in the 1983 Fairfield Works Agreement , and therefore they could not recover:

> Considering [the] evidence in the light most favorable to the plaintiffs, the jury could find the pension issue was the subject of secret discussions several times during the FWA negotiations and that Rich considered the pensions a condition of settlement, but USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign. There is also some evidence from which the jury could infer that USX "committed" to providing the pensions, and that USX intended to influence Rich and Phillips in some manner.
>
> There is no indication or evidence that the negotiators on either side were swayed by their outstanding request for pensions while they negotiated the terms of the agreement. In light of the undisputed evidence that the FWA never changed after USX promised to

consider the pension issue, the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA.

More importantly, in view of the additional undisputed evidence that the concessions resulted from the need to make the Fairfield Works profitable before it was reopened, the jury could not soundly infer that it was more likely that the concessions resulted from the bribery of Union officials than from economic necessity. From the evidence plaintiffs presented, a jury could only speculate about USX's motives in giving pensions to Union officials. There is no evidence from which the jury could conclude USX obtained the FWA concessions as a result of paying Union officials pensions. Plaintiffs' invitation to assume that the concessions must have been the result of bribery is not sufficient where the concessions could just as likely have resulted from the need to make Fairfield economically viable.

The district court's assertion, that there was substantial evidence that the concessions were caused by adverse economic conditions in the steel industry at the time, apparently refers to the deposition testimony of the negotiators: that the pension question had not influenced the Agreement; that the USX negotiators had said USX could not afford to reopen the plant without concessions; and that the Union negotiators did win a less concessionary agreement than the Company had initially been willing to accept.

We begin our analysis by observing that the plaintiffs need not prove that the matter involving the personal pension benefits caused all of the concessions in the Agreement, or that the prevailing economic conditions had no effect on the negotiations. It is well-established that RICO

plaintiffs must prove proximate causation in order to recover. *Holmes v. Securities Investor Protection Corp.*, _____ U.S. _____, _____, 112 S.Ct. 1311, 1317-18, 117 L.Ed.2d 532 (1992); *see also Reverend Father O'Malley v. Reverend Father O'Neill,* 887 F.2d 1557, 1561 (11th Cir. 1989). In other words, "[c]ausation principles generally applicable to tort liability must be considered applicable" in RICO cases. *Brandenburg v. Seidel,* 859 F.2d 1179, 1189 (4th Cir. 1988). A proximate cause is not, however, the same thing as a sole cause. Instead, a factor is a proximate cause if it is "a substantial factor in the sequence of responsible causation." *Hecht v. Commerce Clearing House, Inc.,* 897 F.2d 21, 23-24 (2d Cir. 1990). It is beside the point whether the depressed condition of the steel industry also contributed to the concessions. *See W. Page Keeton et al., Prosser and Keeton on the Law of Torts* § 41, at 268 (5th ed. 1984) ("If the defendant's conduct was a substantial factor in causing the plaintiff's injury, it follows that he will not be absolved from liability merely because other causes have contributed to the result, since such causes, innumerable, are always present.")

Moreover, there were many different concessions worth varying amounts in the Agreement. The proximate cause question is whether Rich and Phillips' pursuit of the pensions was responsible for changing the amount of any concessions to which the Union agreed, not whether it was responsible for the Union's having to make any concessions in the first place or most of the concessions in the final analysis. For example, if the Agreement cost the Union membership X million dollars in total concessions, but would have cost only X million minus 100,000 dollars in concessions but for the personal pension matter, then that matter caused the membership 100,000 dollars in

injury. The district court appears to have recognized as much, noting that "[p]laintiffs' return to work under less favorable conditions constituted an injury to their business or property sufficient to satisfy RICO requirements, if plaintiffs could show they would have returned to work under a less concessionary agreement absent the RICO violations." We agree with that proposition.

To avoid summary judgment, therefore, the plaintiffs must point to evidence from which a reasonable jury could infer that Rich and Phillips' pursuit of pensions for themselves and their friends caused some part of the total dollar amount of concessions in the Fairfield Works Agreement. The district court concluded that "the jury could not reasonably infer that USX's promise influenced the negotiators to make concessions in the FWA," because any deal on the pensions came after the Agreement was in final form (although before it was signed). The court seems to have assumed that the plaintiffs must prove that USX's ultimate agreement to provide the pension benefits caused the concessions. However, the mere request for unearned pension benefits constituted a violation of 29 U.S.C.A. § 186(b) and therefore was racketeering activity under 18 U.S.C. § 1961(1)(C). That request, it will be recalled, was first made early in the course of the negotiations. Accordingly, the element of causation is satisfied if the Union negotiators were influenced to make any amount or degree of concessions in the subsequent rounds of negotiations by their desire to convince the Company to agree to their outstanding illegal request coupled with the Company's failure to reject the pension request from the beginning.

Under the federal standard for the sufficiency of evidence, a plaintiff may prove causation by circumstantial evidence. *Porter v. American Optical Corp.*, 641 F.2d 1128,

1142 (5th Cir. 1981), *cert. denied*, 454 U.S. 1109, 102 S.Ct. 686, 70 L.Ed.2d 650 (1981). "Inferences from circumstantial facts may frequently amount to 'full proof' of a given theory, and may on occasion even be strong enough to overcome the effect of direct testimony to the contrary." *Rutherford v. American Bank of Commerce*, 565 F.2d 1162, 1164 (10th Cir. 1977). Here, although there may be no direct evidence that the Union negotiators made concessions to obtain personal pension benefits, there is a great deal of circumstantial evidence that could lead a reasonable jury to that conclusion. We are particularly reluctant to disregard inferences drawn from circumstantial evidence as to the negotiators' motive. This Circuit is "mindful that 'summary procedures should be used sparingly . . . where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot.' " *Amey, Inc. v. Gulf Abstract & Title, Inc.*, 758 F.2d 1486, 1502 (11th Cir. 1985) (quoting *Norfolk Monument Co. v. Woodlawn Memorial Gardens*, 394 U.S. 700, 704, 89 S.Ct. 1391, 1393, 22 L.Ed.2d 658 (1969)), *cert. denied*, 475 U.S. 1107, 106 S.Ct. 1513, 89 L.Ed.2d 912 (1986).

In the following paragraphs, we discuss the facts which a reasonable jury could rationally find from the evidence at the time summary judgment was granted, and the evidence from which these facts could be found. Then, we will discuss the cumulative effect of these facts and the conclusion that rationally could be inferred from them. As we said in *Swint v. City of Wadley*, 5 F.3d 1435, 1439 (11th Cir. 1993), "what we state as 'facts' in this opinion for purposes of reviewing the rulings on the summary judgment motion [ ] may not be the actual facts. They are.

however, the facts for present purposes, and we set them out below."

Gaining the personal pension benefits was of paramount concern to Rich and Phillips in the Fairfield negotiations, and it was a condition of their agreement to any settlement. Emmett Bruce Thrasher, director of another International Union district, testified at the criminal trial that Rich had told him that achieving the pension benefits would be a prerequisite of the Union negotiators' consent to any agreement in the Fairfield negotiations. USX's Vice President for Labor Relations, William Miller, took notes at an October 27, 1983, meeting during the negotiations which also refer to Rich's demand for pension benefits as "a condition of settlement" of any agreement at Fairfield.

Rich and Phillips brought their personal pension demand up more than once, and it was discussed intermittently throughout the negotiation process. Miller testified that Rich first raised the matter after one of the early negotiating sessions by saying "I want this taken care of" while handing Miller a piece of paper on which the demand for pension credit for Fairfield Union officials was written. On December 22, 1983, two days before the end of the negotiations, Miller met in Pittsburgh with other high-ranking USX officials and listed the pension credits for the Union officials as one of the items still on the table. Miller testified that he reported that, "Mr. Rich and Mr. Phillips had continued to talk about the matter in the context of . . . other corporations and what they were doing." Furthermore, when Miller asked J. Bruce Johnston, USX Executive Vice President for Employee Relations, for instructions on how to respond to Rich and Phillips' ultimatum on the pension question, Johnston responded with a very detailed set of conditions under which USX would

agree to the pension request. (Johnston testified that he told Miller not to guarantee anything, but the notes Miller took during the conversation contain no such instruction.) It is permissible to infer that Johnston would not have produced such a detailed list of conditions for the pension benefits if the subject of the pension benefits had been mentioned only once months earlier and then dropped; therefore, the benefits had been discussed several times over the course of the negotiations while the concessions were being hammered out.

The subject of personal pensions for Rich and Phillips was always discussed between them and the USX negotiators in secret. Rich first raised the issue by slipping Miller a handwritten note after a negotiating session. Phillips testified that thereafter, when the USX negotiators discussed the subject, they never did so in the hotel conference room where the formal negotiations were held, but only in a small room across the hall or in the hallway or lobby.

After the concessions were negotiated, Rich and Phillips refused to sign the Agreement until they received assurances that their pension requests would be considered favorably. Miller testified in deposition that Rich and Phillips refused to sign the Fairfield Agreement until they had received an answer to their request for pension credit, and that as far as USX was concerned, "their signatures were essential." Only after he told them that he thought their pension request "would be considered favorably" did they sign, Miller testified.

The words and actions of USX officials indicate that the Company itself believed that it had made a commitment to provide the pension benefits as part of the Fairfield Works Agreement. Johnston's signature appears on the recommendation for pensions for the Fairfield Six,

which states that the "pensions . . . are recommended *in accord with the December 24, 1983 agreement* between the Company and the USW at Fairfield Works." (Emphasis added). According to the original proposal, the pensions were to start on September 1, 1984. A September 25, 1984, letter to Johnston from J.D. Short, USX's Vice President for Employee Benefits, refers to a change in the starting date to February 29, 1984, "as I understand the *commitment* was made that" the pensions would be effective as of March 1. The pension requests submitted by each of the Fairfield Six bear the notation "Per 12-24-83 Agreement." Furthermore, when other Union officials applied for similar pensions, Johnston wrote Union president Lynn Williams that the policy was being cancelled—but that the Fairfield Six would continue to receive their payments. That action and the documents quoted above indicate that USX's supposedly unilateral change in policy was actually the result of a commitment to provide pensions to the Fairfield Six, a commitment given in exchange for concessions from Rich and Phillips.

The defendants tried to keep the existence of the Fairfield Six's pensions secret. In 1986, two years after he had begun receiving his pension, Rich told two other Union representatives that the pension matter had not been resolved in the Fairfield negotiations, so that they need not apply for pensions. There is evidence that Phillips emphatically denied that pension credits were even discussed at the Fairfield negotiations. Although Union president Williams received a letter from USX in 1985 stating that USX had changed its leave-of-absence policy to allow Union representatives longer leaves of absence "at the discretion of the Company on a case-by-case basis," the Union never approached the Company about granting more such leaves

of absence and seems not to have informed any of its representatives of the opportunity. Furthermore, in its answer to a lawsuit filed by Emmett Bruce Thrasher, also a Union representative, the Union denied the allegation that Rich, Phillips, and others had received pensions as part of the Agreement. In another lawsuit brought by William Sommerville, also a Union representative, Union attorney Bernard Kleiman swore in an affidavit that Rich, Phillips, and two others of the Fairfield Six had not retired from USX as of January 30, 1986, although USX records clearly indicate that, for pension purposes, they had retired.

USX, like the Union, told no other Union representative about the change in its pension policy, although a number of other Union representatives would appear to have qualified for it. During the negotiations, Miller asked Schick, USX's General Manager of Labor Relations, to prepare information on the Fairfield Six and to keep the matter confidential. Ed Owens, a USX official at the Fairfield plant, was asked to prepare pension documents for the Fairfield Six and not to "publicize" it; according to USX, those documents have now disappeared.

A jury could find it strange that those who insist that their conduct was proper and their intent pure went to such great lengths to hide it all from the light of day. From such secrecy much may be inferred.

Giving the Fairfield Six the pensions Rich and Phillips demanded during contract negotiations cost the Company a substantial sum of money, and the Company would not have agreed to that private concession without a concession from the Union side in return. Johnston, testifying about a request that International Union president Lynn Williams made during the same period that USX extend pension benefits for workers at another plant, said that he

told Jim Short: "I'm sure not going to voluntarily give away millions of dollars that we might not have to give away in a year in which we are losing money at an awesome rate." He also recalled that "all during '83 and '84 we had a very correct and very tough and very hardnosed arm's length relationship with the Steelworkers." It strains credulity to suggest that a company committed to the profit motive, in a period in which it was in dire financial straits, would in a "very hardnosed arm's length relationship" give away, for nothing in return, unearned pension benefits that cost USX hundreds of thousands of dollars.[2]

Instead of receiving personal pension benefits for themselves and their friends, Rich and Phillips could have demanded and obtained from USX a reduction in the Union's concessions of an amount equal to the cost of the pensions. That conclusion follows as a matter of economics from the nature of the collective bargaining process. There is no reason why a company that would agree to give up a dollar in unlawful pension benefits to union officials would not instead agree to accept one dollar less in concessions from the Union. Indeed, assuming that freedom from the risk of detection and prosecution is worth something to corporations and their officials, it is reasonable to infer that the Company would have been willing to forego more than one dollar in concessions for every dollar it could have avoided paying out in illegal benefits.

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[2] At oral argument, counsel for the Union conceded that the pensions "may well" have been worth hundreds of thousands of dollars. USX's records reveal that the pensions received by the Fairfield Six paid from $888.67 per month to $1,183.25 per month. According to the plaintiffs, the present value of such a pension for Emmett Bruce Thrasher, a Union official who was not included in the Fairfield Six, would have been $88,574.00 in 1987. Whatever their precise value, it is clear that the pensions were worth a substantial amount of money.

In summary, negotiating their personal pensions was of paramount concern to Rich and Phillips, and they considered it to be a condition of settlement. The issue was discussed intermittently throughout the negotiations about concessions, and always in secret. Rich and Phillips refused to sign the negotiated agreement until they received assurances that their pension requests would be considered favorably. The Company and its officials believed that it was committed to pay the pension benefits as part of the Fairfield Works Agreement. All of the defendants tried very hard to keep the pensions secret. The pensions cost the Company a substantial sum of money, and it would not have agreed to them without receiving something in return. Finally, instead of using their position as Union negotiators to gain the pensions for themselves and their friends, Rich and Phillips could have secured a reduction in concessions equal to or greater in value than the pensions. From all of those facts, a reasonable jury could conclude that the pursuit of personal pension benefits by Rich and Phillips, coupled with the Company's failure to reject the idea from the beginning, caused the Agreement to contain more concessions from the Union than it would have contained if Rich and Phillips had been completely loyal to the rank and file Union membership.

The district court observed that "USX did not promise to favorably consider the pension request until after the FWA was completed and typed and when Rich and Phillips refused to sign." Because the Agreement's text did not change after USX promised that the request "would be considered favorably," the court concluded that the plaintiffs could not show that the Union negotiators made any concessions to secure their pensions. The district court erred by placing too much reliance upon the timing of the

Company's formal promise of the illegitimate pensions. As we have explained above, there was ample evidence that, even without a formal agreement, the combination of illicit behavior by Rich, Phillips, and the Company caused the amount of the concessions actually negotiated to be more than they would otherwise have been.

Moreover, the district court placed too little weight on the value of the signatures of Rich and Phillips to the negotiated Collective Bargaining Agreement. Even though the agreement had already been negotiated and the concessions agreed upon, Rich and Phillips had something that the Company needed and was willing to trade for—their signatures as the Union's negotiators. USX was willing to trade a promise to grant the pension benefits (saying the requests "would be considered favorably") in exchange for those signatures, and that trade was made. Instead of trading their signatures for personal pension benefits, which the Union concedes "may well" have been worth hundreds of thousands of dollars, Rich and Phillips could have traded their signatures for the benefit of all of the workers whom they represented—refusing to sign until the Company agreed to reduce the amount of concessions granted by the same hundreds of thousands of dollars. Thus, even focusing exclusively upon the conclusion of the collective bargaining process, a rational jury could infer that, as a result of their demand for personal pension benefits, the Agreement was more concessionary than it would have been otherwise. The district court should not have granted summary judgment for the defendants on the causation issue.[3]

[3]USX and the Union argue that the grant of summary judgment can be affirmed on the alternative ground that the plaintiffs failed to produce evidence from which the jury could conclude that they were

(Continued on next page)

3. Union Liability Under RICO

The Union argues in the alternative that the district court's grant of summary judgment for the Union should be affirmed because the Union is not liable under RICO for the acts of its representatives. The Union argues that because it is the victim of the racketeering activity of its negotiators, it should not be held liable for their violations.

The plaintiffs argue that the Union can be liable under RICO, not only under the principle of *respondeat superior,* but also because "the Union not only learned of its employees' illegal acts and failed to take action, but also willfully participated, conspired, aided and abetted, ratified and actively concealed the illegal acts of Rich and Phillips," while under a fiduciary duty to act in the best interest of its members. They contend that the Union is not a victim; the victims, they maintain, are the "rank-and-file" workers.

We will address in turn the theories that the parties have put forward.

a. Liability of "Victim" Enterprise Under RICO

According to the Union, "Congress did not intend RICO liability to attach to legitimate enterprises that are used as passive instruments for the racketeering activities of employees or others," but instead intended to protect those enterprises. The Union argues that, in response to

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(Continued)
actually injured (as opposed to evidence from which the jury could conclude that the injury was caused by the pension request). However, because a rational jury could infer that the Agreement was more concessionary than it otherwise would have been, the jury could find injury.

Congress' intention, "the cases . . . hold that where an individual violates RICO by using an enterprise as the instrumentality of his racketeering activities, liability attaches to the wrongdoing individual, not to the enterprise."

The district court determined that there was no support in the record for the Union's claim that it was a victim. The only injury alleged was the injury to the Union member plaintiffs; the Union produced no evidence that the Union itself had been victimized. The court therefore held that the Union had failed to demonstrate the absence of a genuine issue of material fact, and refused to grant summary judgment on the basis that the Union was a victim of racketeering activity and therefore could not be held liable for that activity.

However, we need not address the question of whether the Union presented adequate evidence of its victimization, because we reject the Union's argument that "[t]he law in this Circuit is fully consistent with" the cases refusing to hold RICO enterprises liable for the violations of their subordinates. Our review of the cases cited by the Union reveals that although some courts have recognized a narrow exception to vicarious liability under RICO, that exception has been created in order to preserve the non-identity rule (that under § 1962(c), the RICO defendant and the RICO enterprise cannot be one and the same). As discussed in subpart B.1.b, above, this Circuit has unequivocally rejected that rule.

The cases that the Union cites for the proposition that an enterprise is not liable under RICO for the acts of its employees which abuse the enterprise all trace their roots to *Haroco, Inc. v. American Nat'l Bank & Trust Co.*, 747 F.2d 384 (7th Cir. 1984), *aff'd*, 473 U.S. 606, 105 S.Ct.

3291, 87 L.Ed.2d 437 (1985). In *Haroco*, the Seventh Circuit held that the American National Bank could not be liable under 18 U.S.C. § 1962(c), because that subsection "requires separate entities as the liable person and the enterprise which has its affairs conducted through a pattern of racketeering activity." *Id.* at 400. The *Haroco* court reasoned that the "non-identity" requirement of § 1962(c) would not allow corrupt corporations to escape all RICO liability, because § 1962(a) contains no such requirement; under that subsection, "the liable person may be a corporation using the proceeds of a pattern of racketeering activity in its operations." *Id.* at 402. As a result, the "corporation-enterprise" is "liable under RICO when the corporation is actually the direct or indirect beneficiary of the pattern of racketeering activity, but not when it is merely the victim, prize, or passive instrument of racketeering." *Id.*

In *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987), *cert. denied*, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989), "to avoid holding vicariously liable a corporation that was the victim of a RICO violation," the Seventh Circuit held that a corporation will be held vicariously liable for the RICO violations of its employees "only when 1) the corporation has derived some benefit from the RICO violation and 2) imposing vicarious liability is not inconsistent with the intent of Congress." *Id.* (emphasis omitted). Following the reasoning laid out in *Haroco*, the court held that "[v]icarious liability . . . has only limited application to civil RICO." *Id.* The Seventh Circuit has voiced concern "that *respondeat superior* might be used to circumvent § 1962(c)'s requirement that the person conducting the racketeering activities be separate from the enterprise through which those activities are conducted." *Ashland Oil, Inc. v. Arnett*,

875 F.2d 1271, 1281 (7th Cir. 1989). Nonetheless, the Seventh Circuit has approved vicarious liability when holding the employer liable would not violate the non-identity rule: "*Respondeat superior* is . . . entirely appropriate under both subsections (a) and (b)" of § 1962, because those subsections contain no non-identity requirement. *Liquid Air Corp.*, 834 F.2d at 1307. Similarly, *respondeat superior* will make liable under § 1962(c) a corporation whose officers conspire to conduct the affairs of *another* corporation through a pattern of racketeering, because the *second corporation* then serves as the RICO "enterprise." *Ashland Oil*, 875 F.2d at 1281.

Despite the inclusion of some broad language, the cases cited by the Union stand only for the proposition that, in order to preserve the non-identity rule, vicarious liability should not be imposed under § 1962(c) where the employer is also the RICO enterprise. Thus, although the First Circuit in *Schofield v. First Commodity Corp.*, 793 F.2d 28 (1st Cir. 1986), stated broadly that "the concept of vicarious liability is directly at odds with the Congressional intent behind section 1962(c)," *id.* at 32, the actual holding of that case was merely that "section 1962(c) does not extend liability to the *enterprise*," *id.* at 30 (emphasis added). That was re-emphasized in a recent First Circuit opinion which viewed *Schofield* as holding merely that "[s]ection 1962(c) does not recognize corporate liability on the *enterprise's* part under a theory of *respondeat superior*." *Miranda v. Ponce Federal Bank*, 948 F.2d 41, 45 (1st Cir. 1991) (emphasis added). Similarly, the Eighth Circuit declined to apply respondeat superior to a corporate defendant for the actions of its chief financial officer, quoting

Schofield: "Both the language of [s 1962(c)] and the articulated primary motivation behind RICO show that Congress intended to separate the enterprise from the criminal 'person' or 'persons.'" *Luthi v. Tonka Corp.*, 815 F.2d 1229, 1230 (8th Cir. 1987).

The D.C. Circuit, in *Yellow Bus Lines, Inc. v. Drivers, Chauffeurs & Helpers Local Union 639*, 883 F.2d 132, 140 (D.C. Cir. 1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C. Cir. 1990) (*en banc*), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991), adopted *Haroco's* view of subsections (a) and (c) of § 1962:

> Through section (a), Congress provided for punishment of organizations which in fact gain from their wrongdoing by focusing on profits gleaned from illegal activities, thus "sparing" organizations that do not so profit. Section (c) likewise immunizes organizations which are merely "victims," but this result depends on the requirement of non-identity of person and enterprise which also places some corrupt organizations beyond reach.

Because of its adoption of the *Schofield* court's non-identity rule analysis, the *Yellow Bus Lines* court sided "with those courts that forbid identity of person and enterprise under § 1962(c)." *Id.*

The Third Circuit, in *Petro-Tech, Inc. v. Western Co.*, 824 F.2d 1349 (3d Cir. 1987), reviewed a complaint in which Petro-Tech sought to recover from Western on six counts under civil RICO; Western was named as the RICO enterprise in only some of the counts. The Third Circuit held that imposing "respondeat superior and aiding and abetting liability" on a corporate defendant named as the RICO enterprise under § 1962(c) "would disrupt the intended operation of 1962(c), by making the § 1962(c)

enterprise . . . liable." *Id.* at 1359. However, in regard to those counts in which Western was not the § 1962(c) enterprise, "theories of respondeat superior and aiding and abetting liability are not out of place," because the non-identity rule was not involved. *Id.* at 1361-62. The Third Circuit has also held that injunctive relief may be granted against an employer found to be a RICO enterprise, even if damages may not. *United States v. Local 30, United Slate,* 871 F.2d 401, 405 (3d Cir. 1989).

The Ninth Circuit recently noted that there is "general agreement that respondeat superior liability is inappropriate under 18 U.S.C. § 1962(c) when the enterprise and person are not distinct." *Brady v. Dairy Fresh Products Co.,* 974 F.2d 1149, 1154 (9th Cir. 1992). However, reasoning that "[r]espondeat superior and agency liability will encourage employers to monitor more closely the activities of their employees and agents to ensure that these agents are not involved in racketeering activities," *id.* at 1155, the Brady court held that "an employer that is benefitted by its employee or agent's violations of section 1962(c) may be held liable under the doctrines of respondeat superior and agency when the employer is distinct from the enterprise," *id.* at 1154.

The Sixth Circuit was recently faced with the question whether "ordinary principles of *respondeat superior*" applied to the Mutual Life Insurance Company (MONY), a group of whose employees violated § 1962(c) by selling fraudulent life insurance policies. *Davis v. Mutual Life Ins. Co.,* 6 F.3d 367, 380 (6th Cir. 1993). The Davis court rejected the argument that "as a matter of law, a corporate principal may not be vicariously liable for its agents' actions in violation of section 1962(c)." *Id.* at 378. Finding that the cases declining to apply vicarious liability were

"intertwined with the widely-embraced principle that a corporation may not be named as both a defendant 'party' and as the RICO 'enterprise,' " *id.*, the Davis court held that those cases are not controlling "where the corporate defendant charged with vicarious liability is *separate from* the RICO 'enterprise.' " *Id.* at 379. Instead, *Davis* held that:

> The rule to be drawn from these cases is that plaintiffs may not use RICO to impose liability vicariously on corporate "enterprises," because to do so would violate the distinctiveness requirement. No such prohibition, however, prevents the imposition of liability vicariously on corporate 'persons' on account of the acts of their agents, particularly where the corporation benefitted by those acts. Such a prohibition, if it existed, would prevent corporate persons from ever being found liable under RICO, since corporate principals may act only through their agents. Such a rule would be manifestly contrary to the intent of Congress, and we decline to adopt it.

Id. Because the RICO enterprise involved in *Davis* was the association of MONY employees who were engaged in the fraud, the non-identity rule was not threatened, and the court upheld the jury's finding that MONY was liable for the acts of its agents. *See id.* at 377-78.

Our review of the law of other circuits thus reveals that the RICO exception to the application of vicarious liability is a narrow one, created to preserve the non-identity rule, and it therefore protects only those employers who are also the RICO enterprise for purposes of § 1962(c). We, of course, have squarely rejected the non-identity rule, observing that liability for the acts of one's agents "is simply a reality to be faced by corporate entities. With the

advantages of incorporation must come the appendant responsibilities." *United States v. Hartley*, 678 F.2d 961, 989 n. 43 (11th Cir. 1982). The narrow exception to vicarious liability recognized by some circuits in order to preserve the non-identity rule is, therefore, inapplicable.

Even if we had adopted the non-identity rule, however, the Union still would not be exempt from liability in this case. Although the plaintiffs have alleged that the Union is a RICO enterprise for purposes of 1962(c), they also allege that the Fairfield Works and the Fund are enterprises as well. The non-identity rule would not be threatened by holding the Union liable for its agents' corruption of the mill or the Fund.

b. *Respondeat Superior* Liability Under RICO

The plaintiffs argue that the Union can be held liable under general agency principles and the *respondeat superior* doctrine. The district court ruled against the plaintiffs on this issue, reasoning that the Union was not liable under agency principles because "the plaintiffs do not claim the Union negotiators, acting with apparent authority, made misrepresentations to them upon which they relied." The plaintiffs argue, correctly, that there is no requirement of reliance for a principal to be liable under RICO for the acts of its agent.

Since the district court entered its order, this Court spelled out the elements of *respondeat superior* liability for RICO violations in *Quick v. People's Bank of Cullman County*, 993 F.2d 793 (11th Cir. 1993). Although we have rejected the "non-identity" rule, we have expressed concern that enterprises that are merely victims of the RICO violations perpetrated by their employees should not be held liable for the acts of their employees under *respondeat*

superior. In *Quick*, 993 F.2d at 797-98, we held that *respondeat superior* liability may be applied under § 1962(b) only to those enterprises that derive some benefit from the RICO violation. The *Quick* court also outlined the "general agency principles" to be applied in determining whether a *prima facie* case of vicarious liability under RICO has been made out:

> Under general agency rules, a corporation (principal) will be vicariously responsible for the wrongful acts of its employees (agents) when the acts are: (1) related to and committed within the course of employment; (2) committed in furtherance [of the business] of the corporation; and (3) authorized or subsequently acquiesced in by the corporation.

Id. at 797 (quoting *Liquid Air Corp. v. Rogers*, 834 F.2d 1297, 1306 (7th Cir. 1987) (bracketed material in original), *cert. denied*, 492 U.S. 917, 109 S.Ct. 3241, 106 L.Ed.2d 588 (1989)). In *Quick*, we upheld the application of *respondeat superior* to hold a bank liable for the actions of one of its loan officers who, among other misdeeds, demanded deposits and loan payments from borrowers in cash and failed to credit them to the proper accounts. *Id.* at 795. Because the officer's "activities were incident to his assigned duties and took place at the Bank during business hours," we determined that the first element of vicarious liability was satisfied. *Id.* at 797. Because the officer's activities were related to his function of making loans, we determined that the second element was satisfied as well. *Id.* at 797-98. As to the third element, we determined that there was sufficient evidence the bank had acquiesced in the officer's activities because it, among other things, attempted to cover up the misconduct. *Id.* at 798.

In the present case, because the demand for personal pension benefits that Rich and Phillips made was incident to their duties as Union representatives in the Fairfield Works negotiations, a reasonable jury could conclude that their actions were committed in the course of their employment, so the first *Quick* element is satisfied. Furthermore, because the demand was related to their function of negotiating on behalf of the Union, a reasonable jury could conclude that the second element, that the action be committed in the furtherance of the business of the principal, is also satisfied. Finally, the Union's failure to investigate the allegations against Rich and Phillips or to discipline them until after their convictions, coupled with its attempt to cover up their wrongdoing, could lead a reasonable jury to find that the Union acquiesced in their misdeeds.

A union's failure to act may constitute acquiescence. In *Prater v. United Mine Workers of America*, 793 F.2d 1201 (11th Cir. 1986), in which a union had been notified of the violent acts of some of its members, we held that "[b]y failing to take any action to stop the violence, union officials acquiesce[d] in or ratified the illegal activities of the union miners." *Id.* at 1210. Similarly, in *Vulcan Materials Co. v. United Steelworkers of America*, 430 F.2d 446 (5th Cir. 1970), *cert. denied*, 401 U.S. 963, 91 S.Ct. 974, 28 L.Ed.2d 247 (1971), in which union members illegally encouraged employees of Vulcan not to report to work, we held that although a union official "may have advised Vulcan employees to return to work, he never took action which could reasonabl[y] have been expected to effectuate this end and thus can be said to have, at the very least, acquiesced in and condoned the illegal activity." *Id.* at 457. In *Local 1814, Int'l. Longshoremen's Ass'n v. NLRB*, 735

F.2d 1384 (D.C.Cir.), *cert. denied*, 469 U.S. 1072, 105 S.Ct. 565, 83 L.Ed.2d 506 (1984), two union officials had been convicted of violating the same anti-bribery statute that Rich and Phillips have been convicted of violating. The D.C. Circuit held that "the Union's retention of [the officials] in their high controlling offices, long after the grand jury indictments had put Local 1814 on notice of their misdeeds, is tantamount to acquiescence or condonation of their unlawful acts." *Id.* at 1396. The Court noted that, "[u]nder such circumstances, one might reasonably have expected a truly upright union to have taken some disciplinary action." *Id.*

In the present case, there is no evidence the Union took any disciplinary action against Rich and Phillips, or even made any effort to investigate their actions, until after their criminal convictions. A jury could find that the Union was put on notice of the misdeeds of its negotiators: by Johnston's 1985 letter to Williams, the Union's president, informing him of the decision to change USX policy and to grant leaves of absence to six Union officials; by Johnston's 1987 letter to Williams informing him that the policy was being dropped, but that the six previously granted pension would continue to receive payments; by the allegations in the *Thrasher* and *Sommerville* suits; and by the indictment in the criminal case. A jury could therefore determine that the Union's failure to take any action against two of its negotiators, after being put on notice of their violation of the anti-bribery statute, constitutes acquiescence in their actions.

A reasonable jury could therefore find that the plaintiffs have made out a *prima facie* case of *respondeat superior* liability on the Union's part. The remaining question under Quick is whether the Union derived some benefit

from the negotiators' RICO violation. In arguing that Rich and Phillips' solicitation of unearned pension credits did benefit the Union, the plaintiffs point to deposition testimony by Union president Lynn Williams, who stated that:

> I believe that every employee of the Union . . . that come[s] from the shops where our members work, ought to be entitled to an indefinite leave of absence so long as they serve the Union, ought to be entitled at whatever time in the future history, so long as they haven't left the Union, to go back to their original place of employment, and I disagree very much with the restrictions . . . which USX has put on that all of these years in the Agreement. . . .
>
> So, I think that anybody, any representative that can push the leave of absence question past that and enable us to get wedges out there will enable us to move that whole leave of absence question forward, I would think in that instance, that is a good thing. . . .

The Union argues that it did not benefit from Rich and Phillips' solicitation of pension credits for the Fairfield Six, because no pension payment was made to the Union. It dismisses the plaintiffs reliance on Williams' comments, contending that Williams was merely discussing recall rights, not pension credits, and that he did not imply that the Union would benefit by trading contract concessions for those rights. Payment to Union officers, the Union argues, "does not establish a benefit to the Union, any more than a bank could be said to benefit from a bribe of a group of its employees."

The Union's argument that it would have benefitted had USX granted recall rights to the negotiators, but did not benefit from the pension rights that were granted, is a distinction without a difference. The question is not

whether the Union benefitted in some overall calculation, weighing the concessions made against the value of the pensions received. The question is whether the Union "derived some benefit from the RICO violation." Quick, 993 F.2d at 797 (emphasis added). Williams' testimony establishes that the Union benefits when one of its representatives is granted a leave of absence to work for the Union. Whether that leave confers recall rights on the employee, or pension benefits, or both, the point is that such benefits make Union representation more attractive, so that the Union has an easier time recruiting workers to serve as representatives. A jury could therefore find that the Union benefitted from the pension benefits given to its negotiators. We therefore must reject the Union's argument that the award of summary judgment can be upheld on the grounds that the Union cannot be liable for the RICO violations of its negotiators.

c. RICO Liability for Violation of Fiduciary Duty

The plaintiffs further argue that the Union is liable for the acts of its representatives because it has a fiduciary duty to the rank and file to monitor the conduct of its representatives and to remedy their illegal actions. The district court rejected that argument, reasoning that even if the Union were liable for failing to take action against Rich and Phillips, that would not make the Union liable for the negotiators' racketeering activity: "[a] breach of fiduciary duty is not, in itself, racketeering activity constituting a predicate act under RICO."

It is true that the duty of fair representation that the Union owes to its members "applies to all union activity, including contract negotiation" and is "akin to the duty owed by other fiduciaries to their beneficiaries." *Air Line*

Pilots Ass'n, Int'l v. O'Neill, 499 U.S. 65, 67, 74, 111 S.Ct. 1127, 1130, 1134, 113 L.Ed.2d 51 (1991). The Union may therefore be liable for approving of, acquiescing in, or concealing a breach of trust committed by one of its employees (although we do not reach that question here). *See Restatement (Second) of Trusts*, § 224(2)(c). As we discuss below, the existence of the fiduciary duty may also be relevant to determining the Union's liability for aiding and abetting the RICO violations of its negotiators. However, as the district court properly held, violating a fiduciary duty is not racketeering activity under 18 U.S.C. § 1961(1), and cannot lead to RICO liability on the Union's part. The district court correctly rejected the plaintiff's fiduciary duty theory of liability.

d. Liability for Ratification of Agent's RICO Violations

The plaintiffs argue that the Union is liable for Rich's and Phillips' RICO violations because its failure to investigate or discipline the two and its efforts to conceal the pensions they received constitute ratification of their actions. The Union contends that it cannot be liable for the acts of its negotiators because it did not ratify their acts with "full knowledge" of the bribery scheme. The district court appears to have agreed with the Union's position. The court reasoned that the letters from Johnston, and the allegations in the *Thrasher* and *Sommerville* cases, were insufficient to give the Union knowledge that its negotiators had broken the law. Distinguishing between allegations and violations, the district court said "[t]he Union's knowledge of . . . allegations of section 186 violations by Union negotiators is not the same as knowledge of section 186 violations by Union negotiators." Without evidence

that the Union knew the truth of the allegations, the district court reasoned that the plaintiffs could not support their claim that the Union ratified Rich and Phillips' actions.

"A principal can ratify the unauthorized act of an agent purportedly done on behalf of the principal either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." *McDonald v. Hamilton Electric, Inc.*, 666 F.2d 509, 514 (11th Cir.), *cert. denied*, 459 U.S. 879, 103 S.Ct. 175, 74 L.Ed.2d 144 (1982). The district court's reasoning would seem to require the plaintiffs to produce direct evidence that the Union leadership was aware that Rich and Phillips had in fact engaged in prohibited conduct. However, "proof of authorization or ratification can be based upon circumstantial evidence." *James R. Snyder Co. v. Edward Rose & Sons, Inc.*, 546 F.2d 206, 209 (6th Cir. 1976). A reasonable jury could infer that the Union's failure to act, after having been placed on notice of the negotiators' betrayal by the allegations, constituted ratification of their misconduct.

In *Yellow Bus Lines, Inc. v. Local Union 639*, 883 F.2d 132, 136 (D.C.Cir. 1989), *rev'd in part on other grounds*, 913 F.2d 948 (D.C.Cir. 1990) (*en banc*), *cert. denied*, _____ U.S. _____, 111 S.Ct. 2839, 115 L.Ed.2d 1007 (1991), a Union president received a letter from the president of a bus company which contained allegations that Union members had committed violent acts; there was no evidence "to indicate that the union took action to investigate the allegations or to curb any excesses" of the strikers. The D.C. Circuit held that from the Union's "apparent lack of concern with the violence brought to its attention,

the jury plausibly could conclude that the [Union] 'knowingly tolerated' this state of affairs. No more is required to support a finding of ratification." *Id.*

The situation in this case is similar to that in *Yellow Bus Lines*, and we find the reasoning of that case to be persuasive. Union president Williams testified that he thought it would be "a good thing" for Union representatives to "push the leave of absence question forward;" Williams received a letter from Johnston informing him of the change in USX policy and that six Union representatives had been given pensions; the *Thrasher* and *Sommerville* suits were filed, alleging that Rich and Phillips had received pensions out of the Fairfield negotiations, and Rich and Phillips were indicted for receiving the bribes. In spite of all that, the Union took no action. From the Union's failure to act, a reasonable jury could conclude that the Union "knowingly tolerated" the situation, and thereby ratified it. The same failure to take action that constitutes acquiescence for purposes of *respondeat superior* liability (as we concluded above in subpart II.B.3.b) is also sufficient to constitute ratification. *Prater v. United Mine Workers of America*, 793 F.2d 1201, 1210 (11th Cir. 1986).

e. Aiding and Abetting Liability Under RICO

The plaintiffs argue that the Union is liable under RICO for aiding and abetting the RICO violations that Rich and Phillips committed, either because it failed to take any action against them or because it affirmatively covered up their misdeeds. The district court held that the Union could not be liable for aiding and abetting the actions of its representatives by virtue of "'mere negative acquiescence,'" but instead, "there must be evidence that

the Union committed an overt act designed to aide in the success of the venture." The court considered the actions taken by the Union in the *Thrasher* and *Sommerville* suits: denying the allegation that Rich, Phillips and others received pensions as a result of the Fairfield Works Agreement; and filing an affidavit by Union attorney Bernard Kleiman, denying that Rich and Phillips were retired from USX, when in fact they had retired and were receiving pensions. It held that these actions could constitute concealment subjecting the Union to liability if the responsible Union officials knew the truth about the pensions. Accordingly, the district court denied the Union's motion for summary judgment on the aiding and abetting claim, although the denial appears to be without prejudice to a renewal of the motion at the close of discovery.

One who aids and abets two predicate acts can be civilly liable under RICO. *Petro-Tech, Inc. v. Western Co. of North America,* 824 F.2d 1349, 1356 (3d Cir. 1987). To establish civil liability for aiding and abetting, the plaintiffs must show: (1) that the defendant was generally aware of the defendant's role as part of an overall improper activity at the time that he provides the assistance; and (2) that the defendant knowingly and substantially assisted the principal violation. *See Schneberger v. Wheeler,* 859 F.2d 1477, 1480 (11th Cir. 1988), *cert. denied,* 490 U.S. 1091, 109 S.Ct. 2433, 104 L.Ed.2d 989 (1989); *Woodward v. Metro Bank of Dallas,* 522 F.2d 84, 94-95 (5th Cir. 1975); *Halberstam v. Welch,* 705 F.2d 472, 477 (D.C. Cir. 1983). The defendant's "[k]nowledge may be shown by circumstantial evidence, or by reckless conduct." *Woodward,* 522 F.2d at 96. The same evidence that would support a jury's finding that the Union "knowingly tolerated" Rich and Phillips' actions pursuant to the plaintiffs' ratification theory (the

letter from Johnston, the allegations in the *Thrasher* and *Sommerville* suits, and the criminal indictment) will also support a jury's finding that the Union was aware of its general role in the scheme.

As we have already concluded in our discussion of causation in subpart II.B.2, above, the jury could infer that the Union took steps to conceal the unearned pensions that USX awarded to the Union's negotiators. Whether those steps constitute substantial assistance is a question for the jury. The district court was therefore correct in denying the Union's motion for summary judgment on the plaintiffs' aiding and abetting claim.

f. Co-Conspirator's Liability Under RICO

The plaintiffs' final argument for Union liability is that the Union violated 18 U.S.C. § 1962(d), which makes it a crime "for any person to conspire to violate any of the" other RICO provisions. (As we discussed in part II.B, above, anyone "injured in his business or property by reason of a violation of 1962" may recover treble damages.) To be adjudged liable, "each defendant in a RICO conspiracy case must have joined knowingly in the scheme and been involved himself, directly or indirectly, in the commission of at least two predicate offenses." *Feinstein v. Resolution Trust Corp.*, 942 F.2d 34, 41 (1st Cir. 1991). Proof of an agreement is "the essence of conspiracy." *United States v. Bright*, 630 F.2d 804, 813 (5th Cir. 1980). "Thus, a defendant may wittingly aid a criminal act and be liable as an aider and abettor, but not be liable for conspiracy, which requires knowledge of and voluntary participation in an agreement to do an illegal act." *Id.* (citations omitted). However, "[t]he existence of the conspiracy agreement does not have to be proven by direct evidence.

Instead, it can be inferred from "'the conduct of the alleged participants or fro n circumstantial evidence of the scheme.'" *United States v. LeQuire*, 943 F.2d 1554, 1562 (11th Cir. 1991) (quoting *United States v. Ard*, 731 F.2d 718, 724 (11th Cir. 1984)), *cert. denied*, _____ U.S. _____, 112 S.Ct. 3037, 120 L.Ed.2d 906 (1992). As the district court properly noted, evidence that a defendant assisted in the concealment of a conspiracy may support an inference that the defendant joined in it while it was still in operation. *United States v. Gold*, 743 F.2d 800, 825 (11th Cir. 1984) (quoting *United States v. Freeman*, 498 F.2d 569, 576 (2d Cir. 1974)), *cert. denied*, 469 U.S. 1217, 105 S.Ct. 1196, 84 L.Ed.2d 341 (1985).

The district court reasoned that, if the plaintiffs were able to show that the Union concealed the racketeering activity of its representatives, a "jury could reasonably infer that the Union joined in while the conspiracy was still in operation," and the Union would therefore be liable. We agree. Because a jury could infer that the Union took steps to conceal Rich's and Phillips' RICO violations, a jury should decide whether the Union is liable for conspiring with them.

g. Summary of Holdings on Union Liability

We agree with the district court that the Union cannot be liable for its representatives' RICO violations under the theory that it violated a fiduciary duty to its members. However, the plaintiffs are entitled to go to trial on their claims that the Union is liable for Rich's and Phillips' RICO violations under respondeat superior, ratification, aiding and abetting, and conspiracy theories. We therefore reject the Union's argument that the award of summary

judgment must be upheld because it cannot be liable under RICO.

C. The 301 Claim Against USX

The plaintiffs contend that the district court erred in entering summary judgment against them on their "hybrid" claim against USX for breach of contract under § 301 of the Labor Management Relations Act, 29 U.S.C. 185. As the Supreme Court explained in *DelCostello v. International Bhd. of Teamsters,* 462 U.S. 151, 163-65, 103 S.Ct. 2281, 2290-91, 76 L.Ed.2d 476 (1983),

> an individual employee may bring suit against his employer for breach of a collective-bargaining agreement. Ordinarily, however, an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement .... [H]owever, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. In such an instance, an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on § 301, since the employee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation .... The employee may, if he chooses, sue one defendant and not the other, but the case he must prove is the same whether he sues one, the other, or both.

(internal citations and quotation omitted). The plaintiffs argue that,

> [b]ecause the [Fairfield Works] Agreement is void and unenforceable, USX breached its contractual obligations when USX did not pay members of plaintiff class the full compensation which they should have been paid (from 1984 to date) based on the 1983 Basic Labor Agreement, the 1987 Basic Labor Agreement, and prior practices, without regard to the [Fairfield Works] Agreement.

(The Basic Labor Agreement, between USX and the International, governs all of USX's plants in Canada and the United States, in the absence of local agreements.) The district court rejected the claim on the same ground on which it rejected the RICO claim—that "the court can find no evidence of record from which a jury could conclude that the concessions in the FWA were given in exchange for the pensions." Having decided that a jury could infer that the Fairfield Works Agreement is more concessionary than it would have been had the Union negotiators not solicited and received unearned pension benefits (in subpart II.B.2, above), we cannot agree with the district court's reasoning or affirm its order granting summary judgment on that basis.

USX argues that we should affirm the grant of summary judgment on the alternative ground—which the district court rejected—that the plaintiffs' § 301 claim was not timely brought. In *DelCostello*, the Supreme Court held that the 6-month statute of limitations from § 10(b) of the National Labor Relations Act should be applied to § 301 suits. 462 U.S. at 169, 103 S.Ct. at 2293. The district court, applying a discovery rule, held that the suit was timely brought, because the defendants were unable to show that

the plaintiffs should have uncovered adequate grounds for filing suit prior to six months before the suit was actually filed in December 1988. On appeal, USX argues that our decision in *Hill v. Texaco, Inc.*, 825 F.2d 333 (11th Cir. 1987), precludes the application of a discovery rule to actions brought pursuant to a § 10(b) statute of limitations period. In that case, we observed that principles of equitable tolling "cannot be applied in the face of contrary congressional intent." *Id.* at 334. According to USX, because § 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge," it would be contrary to Congressional intent to apply equitable tolling principles to a § 301 suit. However, we have already held that the discovery rule applies to claims under § 301: "Generally, a cause of action accrues under § 301, and the statute of limitations begins to run, *when in the exercise of reasonable diligence the claimant knew or should have known of the injury.*" *Hill v. Georgia Power Co.*, 786 F.2d 1071, 1074-75 (11th Cir. 1986) (emphasis added); *see also Santiago v. Lykes Bros. S.S. Co.*, 986 F.2d 423, 427 n. 3 (11th Cir. 1993). We are, of course, bound by these prior decisions. The district court's refusal to grant summary judgment on the ground of timeliness was therefore entirely correct.

USX also argues that summary judgment is proper on the alternative ground that the plaintiffs' § 301 claim is meritless, because "operations in accordance with consensual modifications" to the Basic Labor Agreement cannot be a breach of contract. In USX's view, the plaintiffs' claim is one against the Union for breach of the duty of fair representation in signing a bad contract, not against

the Company: "where, as here, the duty of fair representation claim is based upon a breach of duty in negotiating a labor agreement, no 301 employer contract breach is implicated at all." However, the plaintiffs do not allege merely that Rich and Phillips negotiated a bad deal, and we have already concluded that a reasonable jury could infer that USX took advantage of Rich's and Phillips' willingness to pursue personal gain by signing a more concessionary Fairfield Works Agreement than they otherwise would have. And, "[o]f course, a bargain by which a fiduciary takes advantage of his position to profit at the expense of the beneficiary is fraudulent and is voidable by the beneficiary." 6A Arthur Corbin, *Corbin on Contracts*, § 1456, at 534 (1962). Rich and Phillips were fiduciaries of the rank-and-file union membership; the Supreme Court has held that the "duty of fair representation" a Union owes to its members "is . . . akin to the duty owed by other fiduciaries to their beneficiaries." *Airline Pilots Ass'n, Int'l v. O'Neill*, 499 U.S. 65, 74, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1991). The Agreement is therefore voidable.

That does not mean, however, that the plaintiffs are entitled to recover the difference between what they were paid under the Fairfield Works Agreement and what they would have been paid under the Basic Labor Agreement. Upon rescinding a voidable contract, the plaintiffs are entitled "to the reasonable value of a performance rendered" to the Company. 6A Corbin, § 1535, at 822. "Reasonable value" is determined by the marketplace, free of illegitimate taint. It is clear that the rates provided for in the Basic Labor Agreement are not the reasonable market value the plaintiffs would have received for their labors, because it is undisputed that USX had shut down the facility rather than pay those rates. Instead, the proper

measure of the value of the work done is the value that the parties would have agreed upon had the Union negotiators not violated their fiduciary duty. In other words, if a jury finds that the contract was voidable, the plaintiffs are entitled to recover the value of the concessions that the Union negotiators would have extracted from the company if the negotiators had not been pursuing their personal pension benefits.

III. THE ISSUES RELATING TO DISCOVERY

The Union and USX both appeal from orders of the district court rejecting their invocation of the attorney-client privilege during discovery. In the interlocutory appeal and in the appeal of summary judgment on the RICO claim, the plaintiffs complain of limits the district court has placed on their discovery efforts. The areas of discovery affected by the limits may be grouped into four categories: USX pension practices at other plants; grand jury materials; attorney work-product; and limiting the deposition of USX and Union attorneys to written interrogatories.

The Union argues that the plaintiffs failed properly to raise the issues in the district court. According to the Union, the plaintiffs should not be allowed to appeal the limitations on their discovery efforts because the plaintiffs failed to request further discovery into the four areas in either of its Rule 56(f) motions.[4] (The plaintiffs did request

[4]When the plaintiffs first raised this issue in the interlocutory appeal, the Union filed a motion, which was carried with the case, to dismiss the plaintiffs' cross-appeal for want of jurisdiction. The Union's argument was that, because the district court denied the plaintiffs' motion for certification of those parts of the order dealing with rulings adverse to the plaintiffs, they should be considered to be different orders

(Continued on next page)

further discovery of the attorney-client communications and we discuss those requests below.) However, we cannot agree that the plaintiffs should have included the issues in their Rule 56(f) motions. As the plaintiffs' observe, it would not make sense to require them to request "deferral of the summary judgment motions until plaintiffs could complete discovery which the district court already denied." Having raised the issues below, and having appealed from the entry of final judgment, the plaintiffs are entitled to raise the issues on appeal.

A. Standard of Review

To the extent that the appeals involve mixed questions of law and fact, regarding the applicability of the attorney-client privilege to particular communications that the plaintiffs wish to discover, our review is plenary. *In re Grand Jury Matter No. 91-01386, 969 F.2d 995*, 997 (11th Cir. 1992); *In re Grand Jury Proceedings 88-9 (MIA)*, 899 F.2d 1039, 1042 (11th Cir. 1990). Otherwise, matters of discovery and evidence are committed to the discretion of the district court. *Wu v. Thomas*, 996 F.2d 271, 275 (11th Cir. 1993); *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416, 1420 (11th Cir. 1992). Discovery orders should not be overturned "unless the district court has abused its discretion and such abuse has resulted in substantial harm to

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(Continued)

for purposes of the interlocutory appeal. The Union's motion was made moot, however, when the plaintiffs raised the same issues in their appeal from the district court's entry of final judgment on the RICO and § 301 claims. "[W]hen reviewing an appeal from a final judgment, this court can review rulings on previous interlocutory orders." *Jones v. Preuit & Mauldin*, 808 F.2d 1435, 1438 n. 1 (11th Cir. 1987) (citing *Aaro, Inc. v. Daewoo Int'l (America) Corp.*, 755 F.2d 1398, 1400 (11th Cir. 1985)). The Union's motion to dismiss the cross-appeal is therefore denied.

> [1] the number of shareholders [seeking discovery] and the percentage of stock they represent; [2] the bona fides of the shareholders; [3] the nature of the shareholders' claim and whether it is obviously colorable; [4] the apparent necessity or desirability of the shareholders having the information and the availability of it from other sources; [5] whether, if the shareholders claim is of wrongful action by the corporation, it is of action criminal, or illegal but not criminal, or of doubtful legality; [6] whether the communication related to past or to prospective actions; [7] whether the communication is of advice concerning the litigation itself; [8] the extent to which the communication is identified versus the extent to which the shareholders are blindly fishing; [9] the risk of revelation of trade secrets or other information in whose confidentiality the corporation has an interest for independent reasons.

Id.

The plaintiffs argue that the *Garner* doctrine applies to a union's assertion of the attorney-client privilege against its members. See *Nellis v. Air Line Pilots Ass'n,* 144 F.R.D. 68, 71 (E.D.Va. 1992) (holding that the *Garner* doctrine applies because unions owe a fiduciary duty to their members under *Air Line Pilots Ass'n v. O'Neill,* 499 U.S. 65, 74, 111 S.Ct. 1127, 1134, 113 L.Ed.2d 51 (1991)); *Aguinaga v. John Morrell & Co.,* 112 F.R.D. 671, 681 (D.Kan. 1986) (holding that the *Garner* doctrine applies to unions because "union officials' association with their members possesses all the essential characteristics of a fiduciary relationship"); *Boswell v. International Bhd. of Elec. Workers Local 164,* 106 L.R.R.M. (BNA) 2713, 1981 WL 27188 (D.N.J. 1981) (applying *Garner* to suit brought by union member against union). The Union urges that we adopt

the Ninth Circuit's reading of *Garner in Weil v. Investment/Indicators Research and Management, Inc.*, 647 F.2d 18, 23 (9th Cir. 1981), that "*Garner's* holding and policy rationale simply do not apply" outside the context of the shareholder derivative suit. Alternatively, the Union argues that the plaintiffs have failed to show good cause, because they are a small percentage of the Union's membership, seeking damages from the Union for themselves, and have shown no need to know what legal advice Williams received.

The district court determined that the *Garner* doctrine should apply to the Union, because *Garner* was premised "on the view that corporate management owed fiduciary duties to the stockholders of the corporation," and because "the relationship between union and union members" likewise "has fiduciary overtones." The court then determined that the plaintiffs had shown good cause, because "the plaintiff class here is a significant percentage of the total Union membership," and "the plaintiffs' suit advances the general membership's interest in providing a check on the Union's proper discharge of its fiduciary duties to the members." The court also noted that the plaintiffs' claim was colorable, that they had identified the specific communication that they wished to discover, that no trade secret is involved, and that there is no other source "from which plaintiffs might gain the same information."

Because we hold that even if the *Garner* doctrine applies, it does not support an exception to the attorney-client privilege under the facts of this case, we need not decide whether the *Garner* doctrine does apply to disputes between a union and its members. We do note that the

Fifth Circuit has firmly rejected "the Ninth Circuit's narrow interpretation of the types of suits covered by *Garner*." *Ward v. Succession of Freeman,* 854 F.2d 780, 786 (5th Cir. 1988) (citing *In re International Sys. & Controls Corp. Sec. Litig.,* 693 F.2d 1235, 1239 n. 1 (5th Cir. 1982)), *cert. denied,* 490 U.S. 1065, 109 S.Ct. 2064, 104 L.Ed.2d 629 (1989). However, in applying *Garner* to suits brought by shareholders seeking to recover for themselves at the corporation's expense, the Fifth Circuit:

> recognize[d] reason in the *Weil* holding: Where shareholders bring a successful derivative action on behalf of the corporation, they benefit *all* shareholders. Where, however, shareholders seek to recover damages from the corporation for themselves, they do not even seek a gain for all others. In the latter circumstance, the motivations behind the suit are more suspect, and thus more subject to careful scrutiny, in determining if good cause for suspending the privilege exists.

Id. at 786. After applying that "careful scrutiny," the *Ward* court determined that the plaintiffs had failed to show good cause; one of the reasons given was that the "[p]laintiffs cumulatively owned less than four [percent] of the stock in LA Coke." *Id.*

Even assuming the *Garner* doctrine applies to unions, on the facts of this case discovery of the attorney-client communications should not be allowed. Although many of the factors listed in *Garner* appear to support the plaintiffs' argument that there is good cause for discovery, two factors foreclose it: the fact that only a tiny percentage of the defendant Union's members are members of the plaintiff class; and the fact that the interest of the plaintiff class is adverse to those who are not in the class. *Compare Ward,*

854 F.2d at 786 (fact that plaintiffs owned less than four percent of stock weighs against finding of good cause) with *Fausek v. White*, 965 F.2d 126, 133 (6th Cir.) (fact that plaintiffs own 40% of corporation's stock weighs for finding good cause), *cert. denied*, _____ U.S. _____, 113 S.Ct. 814, 121 L.Ed.2d 686 (1992). *Garner* recognized that, in a shareholder derivative suit, which the plaintiffs bring on behalf of the corporation, "it is difficult to rationally defend the assertion of the privilege if *all, or substantially all,* stockholders desire to inquire into the attorney's communications with corporate representatives." 430 F.2d at 1101 (emphasis added). This case, however, is unlike the shareholder derivative suit in *Garner*, because the plaintiff class in this case consists of only about one-half of one percent of the international union's membership. The plaintiffs argue that the district court's assertion that the plaintiff class represents "a significant percentage of the total Union membership" can be defended on the ground that the class "represents practically one hundred percent of the USX employees at [the Fairfield] Works who are covered by the [Fairfield]Agreement." The problem with that reasoning is that the lawsuit was not filed against the local union that represents only Fairfield workers; it was filed against the international union. Moreover, the attorney-client communication in question was not to an officer of the local union but to an officer of the international union. Therefore, the proper measure of significance for the plaintiff class is in terms of the national union, whose membership is so large that it dwarfs the size of the plaintiff class.

This case is also unlike the shareholder derivative suit in *Garner*, and is unlike the shareholders' suit against a

chief executive officer in *Fausek,* because there is no identity of interests between the plaintiffs and the non-plaintiff Union members. Instead, their interests are adverse. The plaintiffs in the present case seek damages not on behalf of the Union, but for their personal benefit at the expense of the Union and its other members. Their interests are directly adverse to those of the other Union members. *Garner* noted that "[d]ue regard must be paid to the interests of nonparty stockholders, which may be affected by impinging on the privilege." *Id.* at 1101 n. 17. Where such a small fraction of the Union's membership seeks to pierce the attorney-client privilege at the expense of the remaining ninety-nine and one-half percent, "due regard" for the interest of the non-party members requires that the plaintiffs' request be rejected.

2. The Crime-Fraud Exception

The plaintiffs argue in the alternative that the district court's order compelling Williams's testimony can be upheld under the crime-fraud exception to the attorney-client privilege, because "the Union by its counsel" subsequently made numerous false statements about the pension status of its negotiators, as part of an effort to conceal their illegal actions. The district court rejected this argument because "there is no evidence showing the communication furthered any crime or fraud, or . . . was connected with any crime or fraud."

To determine whether the crime-fraud exception applies, we employ a two-part test laid out in *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (11th Cir. 1987):

> First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct

> when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Accord, In re Federal Grand Jury Proceedings, 89-10 (MIA), 938 F.2d 1578, 1581 (11th Cir. 1991).

While the plaintiffs' evidence of the existence of Union cover-up may satisfy the first prong of the test, we agree with the district court that they have failed to satisfy the second. The purpose of the second prong is to identify "communications that should not be privileged because they were used to further a crime or a fraud." *Schroeder*, 842 F.2d at 1227. Although that determination "must take into account that the [party seeking discovery] does not know precisely what the material will reveal or how useful it will be," *Id.*, "[t]here is no reason to permit opponents of the privilege to engage in groundless fishing expeditions," *U.S. v. Zolin*, 491 U.S. 554, 571, 109 S.Ct. 2619, 2630, 105 L.Ed.2d 469 (1989).

> Before engaging in *in camera* review to determine the applicability of the crime-fraud exception, the judge should require a showing of a factual basis adequate to support a good faith belief by a reasonable person that in camera review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies.
>
> Once that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court.

Id. at 572, 109 S.Ct. at 2631 (internal citations and quotation omitted). The plaintiffs have failed to produce any evidence that Williams's communications with the Union's attorneys regarding the Johnston letter furthered or were closely related to an effort on the Union's part to conceal the illegal actions of its negotiators. They have therefore failed to show that the district court abused its discretion in refusing to permit even an in camera review of the communications involved.

3. Waiver

Finally, the plaintiffs argue that the Union waived the attorney-client privilege by allowing counsel Kleiman to testify in the criminal trial, and by filing Kleiman's affidavits in lawsuits brought by Union representatives who did not receive pensions. At the criminal trial, Kleiman testified about the receipt of the letter from Johnston, and what he did in response; Kleiman did not testify as to the conversation he had with Williams about the letter. The district court reasoned that the Union did not waive the privilege because Kleiman did not disclose any confidential communications.

The attorney-client privilege "belongs solely to the client," and the client may waive it, either expressly or by implication. *In re Von Bulow,* 828 F.2d 94, 100, 101 (2d Cir. 1987). We have observed that the doctrine of waiver by implication reflects the position that the attorney-client privilege " 'was intended as a shield, not a sword.' " *GAB Business Services, Inc. v. Syndicate 627,* 809 F.2d 755, 762 (11th Cir. 1987) (applying Florida law) (quoting *Pitney-Bowes, Inc. v. Mestre,* 86 F.R.D. 444, 446 (S.D.Fla. 1980)). In other words, "[a] defendant may not use the privilege to prejudice his opponent's case or to disclose some selected

communications for self-serving purposes." *United States v. Bilzerian*, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied* _____ U.S. _____, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991); *accord United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982) ("Selective disclosure for tactical purposes waives the privilege.").

The plaintiffs' position appears to be that, having allowed Kleiman to testify about the Johnston letter and the pension status of the Union's negotiators, the Union impliedly waived the privilege as to Williams's communications with Kleiman on the subject. There is support for that position in the version of the implied waiver rule suggested in Wigmore's treatise: "[t]he client's offer of his *own testimony* as to *specific facts* about which he has happened to communicate with the attorney is not a waiver. . . . But his offer of the *attorney's testimony* as to such specific facts *is* a waiver," and "a waiver at a first trial should suffice as a waiver for a later trial." 8 Wigmore, Evidence § 2298, at 638, 639 (McNaughton rev. 1961) (penultimate emphasis added). Wigmore bases the distinction between the client offering testimony on a subject, and the attorney doing the same, on his view that "the attorney ought in general not to be used as a witness." *Id.* at 637.

However, Wigmore's broad version of the rule goes beyond the considerations of fairness that have motivated the application of the rule; courts generally have not found a waiver where the party attacking the privilege has not been prejudiced:

> The great weight of authority holds that the attorney-client privilege is waived when a litigant places information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege

> to protect against disclosure of such information *would be manifestly unfair* to the opposing party.

Conkling v. Turner, 883 F.2d 431, 434 (5th Cir. 1989) (emphasis added) (internal quotation omitted); *see also United States v. Aronoff,* 466 F.Supp. 855, 863 (S.D.N.Y. 1979) (finding no waiver where party attacking privilege alleges no prejudice); *Goldman, Sachs & Co. v. Blondis,* 412 F.Supp. 286, 288 (N.D.Ill. 1976) (observing that "it is a uniform rule that when a party's conduct reaches a certain point of disclosure, *fairness* requires that the privilege cease" (emphasis added)); *Wender v. United Services Automobile Ass'n,* 434 A.2d 1372, 1374-75 (D.C.1981) (basing waiver analysis on considerations of fairness); *State v. Von Bulow,* 475 A.2d 995, 1007 (R.I.) (citing *Aronoff* and basing implied waiver analysis on considerations of fairness), *cert. denied,* 469 U.S. 875, 105 S.Ct. 233, 83 L.Ed.2d 162 (1984). In *Sedco Int'l S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.), *cert. denied,* 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982), the Eighth Circuit observed that "[c]ourts have found waiver by implication" in three sets of circumstances: "[(1)] when a client testifies concerning portions of the attorney-client communication, [(2)] when a client places the attorney-client relationship directly at issue, and [(3)] when a client asserts reliance on an attorney's advice as an element of a claim or defense." (Internal citations omitted). As a district court in our Circuit has observed:

> "[a]ll of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party."

Pitney-Bowes, Inc. v. Mestre, 86 F.R.D. 444, 447 (S.D.Fla. 1980) (*quoting Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D.Wash. 1975)).

Because the plaintiffs have failed to explain how they have been prejudiced by any of the actions taken by the Union's lawyers in the criminal case, we decline to find that the Union has impliedly waived its privilege. *See Remington Arms Co. v. Liberty Mutual Ins. Co.,* 142 F.R.D. 408, 415 (D.Del. 1992) (holding that the "Court cannot justify finding a waiver of privileged information merely to provide the opposing party information helpful to its cross-examination or because information is relevant").

Because the attorney-client privilege is not rendered inapplicable by the *Garner* doctrine or the crime-fraud exception, and because it was not waived, the ruling of the district court granting the plaintiff's motion to compel William's testimony is therefore reversed.

C. USX's Attorney-Client Privilege

In the proceedings before the district court, USX has consistently taken the position that "[a]t the time the revised leave-of-absence policy was implemented in October, 1984, ... USX believed the policy to be lawful." Memorandum of USX Corporation and United States Steel and Carnegie Pension Fund In Support of Their Motion To Dismiss, April 3, 1989, at 5; *see also* Pretrial Order at 5. Although USX has denied any intent to assert a defense of advice of counsel or to rely on any privileged attorney-client communications in its defense, the district court observed that "USX's defense ... necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to

rescind the change." Reasoning that "it would be inequitable to allow USX to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law," the district court held that USX waived the attorney-client privilege with regard to such communications.

USX argues that it was the plaintiffs who injected the issue of USX's "state of mind" into the case by including allegations of intentional, criminal wrongdoing in their complaint. Because 29 U.S.C. § 186, the criminal statute that the plaintiffs claim USX violated, contains a component of "willfulness," USX argues that it has merely denied the plaintiffs' allegations, and that a mere denial of *mens rea* should not constitute waiver of the attorney-client privilege.

As we discussed in the previous section, the attorney-client privilege " 'was intended as a shield, not a sword.' " *GAB Business Services, Inc. v. Syndicate 627,* 809 F.2d 755, 762 (11th Cir. 1987) (quoting *Pitney-Bowes, Inc. v. Mestre,* 86 F.R.D. 444, 446 (S.D.Fla. 1980)). USX waives the privilege if it injects into the case an issue that in fairness requires an examination of otherwise protected communications. *Id.* In *Conkling v. Turner,* 883 F.2d 431, 434-35 (5th Cir. 1989), the plaintiff claimed that the RICO statute of limitations period was tolled because he did not know that a statement made by the defendants was false until told by his attorney 18 years after the fact. The Fifth Circuit held that by doing so, he waived the privilege as to communications from his attorney about the statement; "the attorney-client privilege is waived when a litigant 'place[s] information protected by it in issue through some

affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.' " *Id.* at 434 (*quoting Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D.Wash. 1975)) (alteration in original). *See also Lorenz v. Valley Forge Ins. Co.,* 815 F.2d 1095, 1098 (7th Cir. 1987) ("To waive the attorney-client privilege . . . a defendant must do more than merely deny a plaintiff's allegations. The holder must inject a new factual or legal issue into the case."); *Sedco Int'l S.A. v. Cory,* 683 F.2d 1201, 1206 (8th Cir.) ("[B]y asserting fraud, [the defendant] . . . waived his right to assert the privilege to prevent disclosure of communications which might have proven he did not rely on [the plaintiffs'] statements."), *cert. denied,* 459 U.S. 1017, 103 S.Ct. 379, 74 L.Ed.2d 512 (1982). The defendant need not raise an affirmative defense to inject a new issue into the case, although it frequently occurs that way. *Cf. Lorenz,* 815 F.2d at 1098 (stating that new issues are "[m]ost often" injected "through the use of an affirmative defense").

United States v. Bilzerian, 926 F.2d 1285, 1292 (2d Cir.), *cert. denied,* _____ U.S. _____, 112 S.Ct. 63, 116 L.Ed.2d 39 (1991), although a criminal case, is instructive. Prior to his trial for securities fraud, Bilzerian announced his intention to testify that he believed in good faith that certain disclosures he made to the Securities and Exchange Commission were legal. The district court ruled that if he were to do so, he would waive the attorney-client privilege with respect to those communications with his counsel regarding the legality of his actions. Bilzerian therefore declined to assert his good faith belief. He was convicted, and he challenged the conviction, arguing that the district court had prevented him from denying criminal intent—

an essential element of the crime with which he was charged. The Second Circuit rejected his argument, reasoning that:

> Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue. His conversations with counsel regarding the legality of his schemes would have been directly relevant in determining the extent of his knowledge and, as a result, his intent.

Id. The court held that Bilzerian had not been deprived of the right to deny criminal intent; he "was free to deny criminal intent . . . without asserting good faith." *Id.* at 1293.

Similarly, in the present case, USX could have denied criminal intent without affirmatively asserting that it believed that its change in pension fund policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege.

The district court ordered the disclosure of those attorney-client communications bearing on USX's knowledge of the law relating to its leave of absence policy, from the date Rich and Phillips first proposed the payments to May 22, 1988 (the date the Company ceased making direct payments to the Fairfield Six). USX argues that because the Company admits it was not certain of the plan's legality after the Third Circuit's 1986 decision in *Trailways Lines, Inc. v. Trailways, Inc.*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932, 107 S.Ct. 403, 93 L.Ed.2d 356 (1986), the waiver should only apply to communications made before that date. We cannot say, however, that the district

court abused its discretion in determining that the communications USX had with its attorneys, after Trailways and prior to its decision to cease making direct payments, might bear on what USX knew about the legality of the plan, and when USX knew it. Accordingly, the order of the district court is affirmed.

D. Plaintiffs' Attempt to Obtain Discovery of Pension Practices at Other Plants

1. The Parton Matter

The district court granted the defendants' motion for a protective order preventing the plaintiffs from deposing twelve people to inquire about Jack Parton, a Union negotiator at USX's Gary, Indiana, plant. According to the plaintiffs, Parton was granted a series of one-year leaves of absence beyond USX's two-year limit, so that he too earned pension credit at USX while working for the Union, and thus discovery should be allowed so they can show that his case is part of USX's pattern of RICO violations.

The district court determined that it could "find no relationship and no substantial similarity between the Parton matter and the incidents at the Fairfield Works that are the subject of this lawsuit." We disagree. The plaintiffs have produced evidence showing that the manager of employee relations at the Gary Works promised, in the final hours of negotiations on local issues there, to "take care of" Parton should he be reelected to his position within the Union. Internal USX memoranda reveal that Johnston initially refused to agree to the request; however, on November 18, 1983 (the month before he agreed that Rich and Phillips' request would be considered favorably), Miller granted Parton an extension on his leave of absence.

While the district court retains the power to grant a protective order when the information sought in a deposition clearly would be irrelevant, *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979), "relevance is broadly defined in the context of discovery," *Wyatt v. Kaplan*, 686 F.2d 276, 284 (5th Cir. 1982). The Parton matter is plainly relevant to plaintiffs' efforts to establish a pattern of RICO violations. The order of the district court is therefore reversed.[5] The district court does retain its authority to keep discovery about the Parton matter within reasonable bounds.

2. Negotiations at Other Plants

The district court also denied the plaintiffs' request that the defendants produce virtually all documents relating to USX business plans for negotiations with the Union at other USX facilities from 1980 to the present. The plaintiffs argue that such an inquiry is necessary so that they can address the defendants' contention that the concessions in the Fairfield agreement were the result of economic necessity rather than the bribes. The district court found that the request was unduly burdensome, particularly given the fact that "[a]greements at other plants present uncontrollable variables resulting from differences in size, location, equipment, productivity, and other unknowable factors, which makes the collective bargaining process unique to each plant. A comparison of the bargaining results between plants is, therefore, the proverbial comparison of apples and oranges." USX characterizes the plaintiffs' request as

[5]The plaintiffs have filed a motion to supplement the record on appeal to provide this Court with a more complete record on which to evaluate the defendants' arguments. Although we have the "inherent equitable power [ ]" to supplement the record on appeal, *Jones v. White*, 992 F.2d 1548, 1566 (11th Cir. 1993), the materials offered are not necessary for us to decide this issue, and we therefore decline to exercise that power. The motion is denied.

an overwhelmingly burdensome fishing expedition, and objects on the ground that the documents requested contain business secrets.

"Where a significant amount of discovery has been obtained, and it appears that further discovery would not be helpful in resolving the issues, a request for further discovery is properly denied." *Avirgan v. Hull,* 932 F.2d 1572, 1580 (11th Cir. 1991). By any measure, the plaintiffs have had a significant amount of discovery in this case. The plaintiffs were allowed discovery of those of USX's business plans that were related to the Fairfield Works; they have taken 36 depositions and have received over 50,000 documents from USX alone. Limitations on the scope of discovery are "appropriate when discovery would burden the party from whom it is sought unduly, in comparison with any advantage it would provide to the discovering party . . . because a particular matter is of only minor importance." Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure:* § 2040, at 286 (1970). We have already held, in subpart II.B.2 above, that the plaintiffs do not need to show that the prevailing economic conditions had no effect on the negotiations. The substantial burden that the requested discovery would have on the defendants therefore far outweighs any benefits plaintiffs would gain by being able to present a comparison of the results of the Fairfield negotiations to those at other plants. The district court's order denying that discovery was not an abuse of discretion, and it is affirmed.

E. The Grand Jury Materials

The district court also denied the plaintiffs' motion to compel production of testimony and documents presented to the grand jury in the criminal case. The plaintiffs argue

that because the defendants have in their possession a copy of all of the documents and transcripts of all of the testimony presented to the grand jury, and the defendants' witnesses have been uncooperative, they need access to the materials. The plaintiffs also argue that the defendants' interest in preserving the secrecy of the material is minimal, given that the criminal trial is over.

In the proceedings of November 28, 1990, the district court emphasized that its denial of the plaintiffs' motion "does not preclude [the plaintiffs] from renewing the motion with a specific showing of need . . . I didn't feel that you made the particularized showing on any of those grand jury proceedings in order to" compel discovery. It has long been the law of this Circuit

> that disclosure of grand jury testimony is properly granted where there is a compelling need for such disclosure and such disclosure is required by the ends of justice. *Disclosure even in these circumstances must be closely confined to the limited portions of the testimony for which there is found to be a particularized need.*

Allis-Chalmers Mfg. Co. v. City of Fort Pierce, 323 F.2d 233, 242 (5th Cir. 1963) (emphasis added). The plaintiffs have made no effort to identify those portions of the grand jury transcripts for which they have a particularized need. Given the opportunity to renew the motion upon a showing of such need, the plaintiffs are unable to demonstrate that the court's order "resulted in substantial harm" warranting a determination that the court abused its discretion. *Arabian American Oil Co. v. Scarfone,* 939 F.2d 1472, 1477 (11th Cir. 1991). The district court did not abuse its discretion, and its order is affirmed.

F. Attorney Work Product

The plaintiffs moved to compel discovery of one document produced by USX attorneys concerning the leave of absence policy, and several documents produced by Union attorneys, relating to statements made by the Fairfield Six or by Emmett Bruce Thrasher that relate to matters in the litigation. They also moved to compel an answer to an interrogatory asking the Union to identify each statement taken by its attorneys during their investigation into requests by Union officials for USX pensions. The district court denied the motions and sanctioned the plaintiffs for bringing them; the plaintiffs appeal that order.

The attorney work-product privilege traces its roots to the recognition by the Supreme Court, in *Hickman v. Taylor*, 329 U.S. 495, 510-11, 67 S.Ct. 385, 393, 91 L.Ed. 451 (1947), that "it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel." The privilege is presently codified in Fed.R.Civ.P. 26(b)(3), which provides, in part:

> (3) **Trial Preparation: Materials** . . . [A] party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the

> required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

Material that reflects an attorney's mental impressions, conclusions, opinions, or legal theories, is referred to as "opinion work product." *In re Murphy,* 560 F.2d 326, 336 (8th Cir. 1977); *cf. Hickman,* 329 U.S. at 511, 67 S.Ct. at 393; *Upjohn Co. v. United States,* 449 U.S. 383, 399, 101 S.Ct. 677, 687, 66 L.Ed.2d 584 (1981). "Not even the most liberal of discovery theories can justify unwarranted inquiries into the files and the mental impressions of an attorney." *Hickman,* 329 U.S. at 510, 67 S.Ct. at 393. In *Upjohn,* the Supreme Court made clear that an attorney's notes and memoranda of a witness's oral statements is considered to be opinion work product. *Upjohn,* 449 U.S. 383, 399-400, 101 S.Ct. 677, 687-88, 66 L.Ed.2d 584 (1981). As Rule 26(b)(3) makes apparent, "opinion work product can not be discovered upon a showing of substantial need and an inability to secure the substantial equivalent of the materials by alternate means without undue hardship." *Murphy,* 560 F.2d at 336; *see also National Union Fire Ins. Co. v. Murray Sheet Metal Co., Inc.,* 967 F.2d 980, 983 (4th Cir. 1992); *In re Sealed Case,* 676 F.2d 793, 809-10 (D.C.Cir. 1982). Instead, "opinion work product enjoys a nearly absolute immunity and can be discovered only in very rare and extraordinary circumstances." *Murphy,* 560 F.2d at 336.

The crime-fraud exception presents one of the rare and extraordinary circumstances in which opinion work product is discoverable. The exception applies to work-product in the same way that it applies to the attorney-

client privilege. *In re International Sys. & Controls Corp. Sec. Litig.*, 693 F.2d 1235, 1242 (5th Cir. 1982); *see also In re Antitrust Grand Jury*, F.2d 155, 164 (6th Cir. 1986); *Sealed Case*, 676 F.2d at 812; *In re John Doe Corp.*, 675 F.2d 482, 492 (2d Cir. 1982); *In re Grand Jury Proceedings (FMC Corp.)*, 604 F.2d 798, 803 (3d Cir. 1979). Before the crime-fraud exception will be invoked, the plaintiffs must satisfy the two-part test of *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1226 (11th Cir. 1987), which we discussed in subpart III.B, above. *See also In re Federal Grand Jury Proceedings 89-10 (MIA)*, 938 F.2d 1578, 1581 (11th Cir. 1991). Even if the Union engaged in an effort to conceal the unlawful activities of its negotiators, as a jury might find (see subpart II.B.2, above), after our own *in camera* inspection, we agree with the district court that the documents in question were not created to further any crime or fraud; nor are they closely related to any.

The remaining two grounds on which the plaintiffs argue for reversal are not among the very rare and extraordinary circumstances in which opinion work product is discoverable. First, the plaintiffs argue that USX waived the privilege by asserting that it thought its actions were legal, and the Union waived the privilege by allowing one of its attorneys, Kleiman, to testify at the criminal trial and by asserting that it was unaware of Rich and Phillips' actions. The subject-matter waiver doctrine provides that a party who injects into the case an issue that in fairness requires an examination of communications otherwise protected by the attorney-client privilege loses that privilege. *GAB Business Services, Inc. v. Syndicate 627*, 809 F.2d 755, 762 (11th Cir. 1987). However, as the Fourth Circuit has observed in *In re Martin Marietta Corp.*, 856 F.2d 619, 625-26 (4th Cir. 1988), *cert. denied*, 490 U.S.

1011, 109 S.Ct. 1655, 104 L.Ed.2d 169 (1989), the subject-matter waiver doctrine does not extend to materials protected by the opinion work product privilege. The *Martin Marietta* court's reasoning was that the plain language of Fed.R.Civ.P. 26(b)(3) suggests that opinion work product should not be subject to such an implied waiver, and that the rationale behind the doctrine (the fear that a party might " 'make affirmative testimonial use' " of a communication and then seek to shield it from disclosure) does not apply to mental impressions and legal theories. *Id.* at 626 (*quoting Duplan Corp. v. Deering Milliken, Inc.*, 540 F.2d 1215, 1223 (4th Cir. 1976)). We agree. Where a party asserts that he believed his actions to be lawful, he waives the attorney-client privilege as to what his attorney told him about the legality of his actions (see subpart III.C, above); his attorney's work product, however, is a different matter.

The plaintiffs also argue that the *Garner* doctrine applies to work product. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1103-04 (5th Cir. 1970), *cert. denied*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971), held that shareholders suing their corporation may discover communications otherwise protected by the attorney-client privilege upon a showing of good cause. The plaintiffs seek to extend that holding to apply to the relationship between the workers at the Fairfield plant and their Union and their pension fund, as well as to the work product privilege. However, the Fifth Circuit has held that the *Garner* doctrine does not apply to attorney work product. *In re International Sys. & Controls Corp.*, 693 F.2d 1235, 1239 (5th Cir. 1982) (footnotes omitted). We agree. Furthermore, at least as far as the Union is concerned, we have already held, in III.B above, that the *Garner* exception is not justified on the

facts of this case. The district court therefore did not abuse its discretion, and its order is affirmed.

G. Rule 31 Deposition of Attorneys

The final discovery order that the plaintiffs appeal is the *sua sponte* ruling of the district court, pursuant to Rule 31, that the plaintiffs may depose the defendants' attorneys only by written questions. The plaintiffs argue that they should be allowed to take oral depositions, citing the hostility of the witnesses and the defendants' efforts at concealment. The district court reasoned that, "[i]n view of the plaintiffs' continuing efforts to breach the defendants' attorney-client privilege, the court is convinced that these depositions, in the absence of firm control by the court, will almost certainly be attended by continuing disputes and may require that they be supervised by a judicial officer." That order was not an abuse of discretion, and we affirm it.

IV. CLASS CERTIFICATION

The district court declined to certify the plaintiff class for the plaintiffs' claims for equitable relief, and the plaintiffs seek to appeal. Because the plaintiffs seek rescission of the current Fairfield Works Agreement, the district court determined that the conflict between those members of the class who have been recalled to work under that agreement and those that have not made certification inappropriate. Because we do not have jurisdiction over the appeal, we do not reach the plaintiffs' arguments for reversal.

The decision of a district court denying class certification "does not of its own force terminate the entire litigation because the plaintiff is free to proceed on his individual claim. Such an order is appealable, therefore, only if it

comes within an appropriate exception to the final-judgment rule." *Coopers & Lybrand v. Livesay,* 437 U.S. 463, 467, 98 S.Ct. 2454, 2457, 57 L.Ed.2d 351 (1978). The plaintiffs having shown no applicable exception to the final judgment rule, we dismiss their appeal without expressing any view on the merits. *See Gonzalez v. Texas Employment Comm'n,* 563 F.2d 776, 777 (5th Cir. 1977) (dismissing appeal when "appellant, upon whom the burden to show jurisdiction rests, has not demonstrated the applicability of any of the exceptions to" the rule that denials of class certification are not immediately appealable) (internal citation omitted).

V. CONCLUSION

We REVERSE the district court's grant of summary judgment on the plaintiff's RICO claim against USX and the Union, as well as the court's grant of summary judgment on the plaintiffs' § 301 claim against USX for breach of contract. We also REVERSE the decision of the district court granting the defendants a protective order preventing plaintiffs from taking depositions to inquire into the Parton matter. Finally, we REVERSE the district court's decision that the *Garner* doctrine prevents the Union from asserting the attorney-client privilege against the plaintiffs. In all other respects, we AFFIRM, with the exception of the district court's denial of class certification as to the plaintiff's equitable and declaratory relief, which we have no jurisdiction to review.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a U.S. STEEL CORPORATION, et al.,
Defendants.

CV-88-N-2069-S

MEMORANDUM OF OPINION

I. Statement of the Case.

This is a civil action brought by a class of plaintiffs comprised of present and former employees of defendant USX Corporation ("USX" or "the Company") in Jefferson County Alabama who were represented by the United Steelworkers of America, AFL-CIO-CLC ("the Union") at any time from July 1, 1983 to the present.[1] The plaintiffs allege wrongdoing by the Company, the Union and United States Steel & Carnegie Pension Fund ("the Fund") in connection with the negotiation and implementation of the December 1983 Fairfield Works Agreement between USX and the Union. More specifically, they claim, *inter alia,* that certain Union officials demanded and the Company agreed to amend its policy regarding leaves of absence for Union officials in such a way as to make those

[1]The class was certified with respect to damages claims only.

same officials eligible for Company pensions to be paid by the Fund and that the Fund did pay unlawful pensions to certain Union officials. The plaintiffs charge the defendants with: (1) violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961 *et seq.;* (2) breach of the duty of fair representation, 29 U.S.C. § 159; (3) breach of contract; (4) unfair labor practices, 29 U.S.C. § 158, and (5) breach of ERISA fiduciary duties, 29 U.S.C. § 1132 *et seq.*[2]

The action is now before the court on certain discovery motions by which the plaintiffs seek discovery from USX and the Fund. They are: (1) motion to compel the defendants to produce certain documents, filed October 24, 1989; (2) motion to compel answers to the plaintiffs' first set of interrogatories, filed October 24, 1989; and (3) motion to compel certain officers of the defendants to answer questions propounded at their depositions, filed October 26, 1989. The motions have been fully briefed and are ripe for decision.

The defendants have objected to certain discovery requests, claiming they are: (1) oppressive, burdensome and unlikely to lead to the discovery of admissible evidence; (2) protected by the attorney-client privilege; (3) subject to the attorney work-product privilege; (4) requests for a conclusion of law; and (5) unintelligible. The court will first discuss general principles relating to each of these objections and the plaintiffs' responses. It will then particularize and apply those principles to each discovery request that remains in dispute.

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[2]The plaintiffs also allege violations of 29 U.S.C. § 186 as predicate acts in the RICO counts, as the acts constituting breaches of contract and breaches of the duty of fair representation, and as the basis of the unfair labor practice claims. (Plaintiffs' amended complaint, pp. 41-50)

II. Applicable Principles of Law.

II.A. Civil Discovery in General.

The starting point for consideration of any question regarding the scope of discovery in a civil case has to be Rule 26(b), Fed.R.Civ.P. In pertinent part, that rule provides:

> Parties may obtain discovery regarding *any matter* not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . . It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> The frequency or extent of use of the discovery methods set forth in subdivision (a) shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

(Emphasis supplied.) The plain language of the rule provides for very broad discovery. It extends to "any matter" which is not privileged. The only restrictions are that the information must be "relevant to the subject matter involved" in the case and must appear "reasonably calculated to lead to the discovery of admissible evidence."

II.B. The Attorney-Client Privilege.

The rule explicitly recognizes that privileged matters are not subject to discovery. The commonly accepted view is that the same privilege rules apply at both discovery and trial. *United States v. Reynolds*, 345 U.S. 1, 6, 73 S.Ct. 528, 531, 97 L.Ed. 727 (1953); *Campbell v. Eastland*, 307 F.2d 478 (5th Cir. 1963), *cert. den.* 371 U.S. 955, 83 S.Ct. 502, 9 L.Ed.2d 502 (1963). The rule makes no effort to define the various privileges that may limit discovery but leaves it to the courts to "interpret the common law principles of privilege in the light of reason and experience." *Wright & Miller, Federal Practice and Procedure*, Civil § 2016 (1990 Supp.).

The privilege of non-disclosure accorded to communications between an attorney and his client is the oldest privilege recognized by the common law, going back at least to the reign of Elizabeth I. *See generally*, 8 Wigmore, Evidence § 2290 (McNaughton rev. 1962). It was first predicated upon the concept that the attorney was honor bound to maintain the confidences of his client. By the end of the eighteenth century, however, the law recognized the subjective need of the client to be free of apprehension that his consultations with his lawyer would be made publi;, "In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client's consent." Wigmore, § 2291. At the common law, the attorney-client privilege encompassed eight factors.

> (1) Where legal advise of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance

permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Wigmore, § 2292. While appearing to limit the privilege to communications from the client to the lawyer, the better reasoned modern cases hold that communications flowing either from or to the lawyer are subject to the privilege.[3]

The plaintiffs challenge defendants' assertion of the privilege on three grounds: (1) The defendants stand in a fiduciary relationship to the plaintiffs and cannot assert the privilege as against them; (2) Defendants have waived the privilege by relying on the advice of counsel and by selectively producing materials now claimed to be protected; and (3) The defendants sought the advice of counsel in furtherance of criminal or fraudulent activities.

II.B.1. The Fiduciary Relationship.

A corporation is a client for the purpose of invoking the privilege. *E.g., United States v. Louisville & N. R. Co.*, 236 U.S. 318, 35 S.Ct. , 59 L.Ed. 598 (1915); *Garner v. Wolfinbarger*, 430 F.2d 1093, 1097 n. 10 (5th Cir. 1970); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir. 1956), *cert. denied*, 352 U.S. 833, 77 S.Ct. 48, 1 L.Ed. 2d 52 (1956); *Belanger v. Alton Box Bd. Co.*, 180 F.2d 87 (7th Cir. 1950). In *Garner*, the United States Court of Appeals for the Fifth Circuit held that the availability of the attorney-client privilege to a corporation is limited when access to privileged information is sought by stockholders of the

[3] *See, In re LTV Securities Litigation*, 89 F.R.D. 595 (N.D. Tex. 1981) in which the court criticized the view that communications from the lawyer are privileged only if they tend to reveal the client's communications.

corporation in litigation brought by them against the corporation charging the corporation and its officers with acts injurious to their interests as stockholders. In such circumstances, availability of the privilege depends upon a balancing of any injury resulting from disclosure against the benefit to be gained in the proper disposition of the litigation. In a broader context, the question deals with the availability of the privilege where the client asserting the privilege is an entity which, in the performance of its functions, acts wholly or partly in the interests of others, and those others, or some of them, seek access to the subject matter of the communications. Thus, the *Garner* exception to the attorney-client privilege has been extended past the corporation/stockholder conflict. *See e.g. Petz v. Ethan Allen, Inc.*, 113 F.R.D. 494 (D.Conn. 1985) (Employee Welfare Benefit Plan under ERISA); *Aguinaga v. John Morrell & Company*, 112 F.R.D. 671 (D.C. Kan. 1986) (Members of union against the union); *Donovan v. Fitzsimmons*, 90 F.R.D. 583 (N.D. Ill. 1981) (Union pension fund); *Washington-Baltimore Newspaper Guild Local 35 v. Washington Star Co.*, 543 F.Supp. 906 (D.D.C. 1982) (Employee Welfare Benefit Plan under ERISA).

In substance, the rule of *Garner* requires the plaintiffs to demonstrate good cause to overcome the privilege. In deciding whether "good cause" to breach the privilege has been shown, the court should consider: (1) the number of beneficiaries and the extent of their interest; (2) the bonafides of the plaintiffs; (3) the nature of the claim and whether it is obviously colorable; (4) the apparent necessity or desirability of the plaintiffs in having the requested information and its availability from other sources; (5) whether the claimed conduct of the client claiming the privilege is criminal or of doubtful legality; (6) whether the

communication related to past or to prospective actions; (7) whether the communication is of advice concerning the litigation itself; (8) the extent to which the communication is identified as opposed to the extent to which the plaintiffs are merely fishing; and (9) the risk of revelation of trade secrets or other information in whose confidentiality the client has independent interests.

Some courts have dispensed with the requirement that "good cause" be shown in a trustee/beneficiary situation and the plaintiffs have urged the court to do so here. *See, e.g. Washington Star*, 543 F.Supp. at 909, *Cf. Donovan*, 90 F.R.D. at 586-587. The *Garner* court created an exception to the attorney-client privilege and required a showing of "good cause" before the exception would be applicable. The exception was based upon the fiduciary relationship existing between a corporation and its shareholders that is not unlike the fiduciary relationship existing between ERISA plan fiduciaries and the beneficiaries of that plan. The court sees no persuasive reason why the plaintiffs here ought not to be required to meet the good cause condition. The requirement that plaintiffs show "good cause" is as relevant to an ERISA fiduciary situation as it was in the corporate fiduciary context. Unlike the traditional trustee/beneficiary situation, a typical ERISA fiduciary has duties running to many plan beneficiaries. 29 U.S.C. § 1104(a)(1). In this respect, the position of the ERISA fiduciary is more akin to the corporate fiduciary than to the traditional trustee who has responsibility to only a few beneficiaries. The *Garner* "good cause" factors are relevant where there are many beneficiaries who must be protected from the results of actions that may be taken by a disgruntled few.

See *Garner*, 430 F.2d at 1101, n. 17. Finally, *Garner* is binding on this court.[4]

USX claims the Garner exception has no application in the context of the present case because it was not acting as an ERISA fiduciary with respect to the particular communications at issue. Plaintiffs argue USX was acting as a plan fiduciary with respect to the "decision to pay pension benefits to Union officials and the subsequent decision to pay the benefits into escrow." They also contend that USX stands in a fiduciary relation to the beneficiaries of its employee benefit plan because the Fund's board of directors and "Administration Committee" are USX in-house attorneys and because the Fund is managed by James Short, a USX vice-president.

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan . . .

29 U.S.C. § 1002(21)(A). An employer, such as USX, is an ERISA fiduciary if it exercises discretionary authority or control with regard to management or administration of an ERISA plan. *Hales v. Winn-Dixie Stores, Inc.*, 500 F.2d 836, 843 (4th Cir. 1974), *Genter v. Acme Scale & Supply*

[4] In *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (*en banc*), the Eleventh Circuit Court of Appeals adopted as binding precedent all of the decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

Co., 776 F.2d 1180, 1184-85 (3rd Cir. 1985), 29 U.S.C. § 1002(21)(A). On August 1, 1978 the Company and the Fund entered into an agreement whereby the Company agreed to provide certain administrative services to the Fund. The agreement makes it clear that, in doing so, the Company undertook duties making it an ERISA fiduciary with regard to the beneficiaries of the Company's employee benefit plans. The plaintiffs here are beneficiaries of those plans.

A finding that the Company has acted and continues to act as an ERISA fiduciary with respect to the employee welfare plans, however, does not lead necessarily to the conclusion that the Garner exception applies to all its activities. "[T]he ERISA scheme envisions that employers will act in a dual capacity as both fiduciary to the plan and as employer. ERISA does not prohibit an employer from acting in accordance with its interests as employer when not administering the plan or investing its assets." *Phillips v. Amoco Oil Co.*, 799 F.2d 1464, 1471 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S.Ct. 1893, 95 L.Ed.2d 500 (1987).[5] Therefore, to the extent USX was acting solely as an employer, and not as a plan fiduciary, the Garner doctrine would not apply to abrogate the attorney-client privilege asserted by USX. The task here is to determine whether USX's actions with respect to the communications at issue were taken in its role as fiduciary, or in its role as employer.

[5]Plaintiffs argue that cases that do not involve claims of attorney-client privilege are not pertinent to any issue in this case. However, the *Garner* doctrine applies only in fiduciary situations, therefore the determination of when USX was acting as a fiduciary is critical to deciding what communications between USX officials and their attorneys must be divulged. To the extent these cases are helpful in determining when USX was acting as a fiduciary and when it was acting in its capacity as an employer, the court finds them helpful.

The court is convinced that the plaintiffs have made the "good faith" showing required by *Garner*. There is no evidence of the total number of plan beneficiaries, but it appears the plaintiffs who here seek disclosure of communications between the fund and its attorneys represent a relatively small percentage, compared to the total number of plan beneficiaries. However, plaintiffs' interests are not substantially in conflict with the interests of other beneficiaries, at least with regard to the plaintiffs' ERISA claim. Central to the ERISA claim is that the Fund's assets have been diminished by the unlawful payment of pensions to Union officials. If the plaintiffs win on that claim they will be entitled to have the Fund reimbursed in the amount of any pensions that are found to have been illegally paid. Such a judgment would benefit the ERISA plan and all its beneficiaries. The plaintiffs obviously have colorable claims against these defendants. At least as to USX some of the alleged conduct underlying the action may have been criminal.[6] At least some of the communications between client and attorney which are sought in discovery concern matters involved in this litigation. Finally, there is no indication that USX or the Fund have independent interests in the confidentiality of the information requested.

Plaintiffs claim that USX was acting as a fiduciary whenever it took actions that resulted in the payment of pension benefits to six Union officials. However, the implementation of payments of pension benefits to the Union officials involved two discrete acts on the part of

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[6]USX and some Union officials have been convicted in this court of certain violations of the Taft-Hartley Act based upon some of the same acts which are alleged to underlie these claims. *See, United States of America v. USX,* CR-89-HM-252-S.

the Company. First, USX had to change its corporate policy regarding leaves of absence so that Union officials could, retroactively, be credited with company service for pension purposes for time they were actually employed by the Union. Second, USX had to cause the Fund to award pensions to those same Union officials based upon their newly credited company service. In the opinion of the court, USX acted as a fiduciary with regard to the plaintiffs only with respect the latter actions. The law is clear that USX may have had "discretionary authority" and "control" over the Fund, but it did not act as a fiduciary except when it exercised that authority and control to administer the plan. *Phillips, supra.* "[W]hen an employer decides to establish, amend, or terminate a benefits plan, as opposed to managing any assets of the plan and administering the plan in accordance with its terms, its actions are not to be judged by fiduciary standards." *Musto v. American General Corp.*, 861 F.2d 897, 912 (6th Cir. 1988), *cert. denied*, _____ U.S. _____, 109 S.Ct. 1745, 104 L.Ed.2d 182 (1989). USX's power to change its corporate leave of absence policy was derived from its role as an employer and not from its role as administrator of the pension plan. It was therefore not acting as a fiduciary when it changed the leave of absence policy. That the company's action intentionally impacted on the pension plan does not alone establish that the company was acting in its fiduciary capacity with regard to the changing of the leave of absence policy. *See Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 286 (3rd Cir. 1988), *Musto, supra.*

The plaintiffs also allege USX's amendment of its leave of absence policy was part of a conspiracy between the company and the fund to use the monies of the fund, and that USX and the Fund later conspired to conceal the

change in the leave of absence policy and payment of benefits. Plaintiffs have not explained how a conspiracy would implicate USX's fiduciary duties where they otherwise were not involved, or how they believe a conspiracy would affect the application of the Garner doctrine. In the case plaintiffs rely upon, *Amato v. Western Union International, Inc.*, 773 F.2d 1402, 1417 (2nd Cir. 1985), claims of a conspiracy were held to state a claim for breach of fiduciary duty "[t]o the extent that defendants, wearing their hats as Plan fiduciaries" acted. Without any guidance from the plaintiffs with regard to the significance of a conspiracy in this context, the court declines to speculate.

Unlike the decision to change the company's leave of absence policy, the decisions to pay or not to pay benefits from the fund in accordance with the leave of absence policy, and to pay the benefits into escrow accounts, were discretionary decisions necessarily made by an administrator of the Fund. To the extent USX and its officers participated in those decisions, the Company was acting in its fiduciary capacity and plaintiffs are entitled to discovery of matters related to those decisions without regard to the attorney-client privilege.

The Company also acted as a fiduciary whenever it undertook to act as the plan administrator pursuant to the August 1, 1978 Agreement between itself and the Fund. To the extent USX attorneys provided legal advice to the fund and Company officers who were responsible for administering the fund, USX was acting in its administrative capacity pursuant to the terms of the 1978 Agreement, and any advice so supplied was provided either as a fiduciary to the fund or as legal advisor to a fiduciary of the fund.

The Fund itself clearly fits within the *Garner* exception for all purposes, and cannot assert the privilege

against the plaintiffs. Therefore, those corporate officers who served as administrators of the fund or on the fund's board of directors may not assert the attorney client privilege against these plaintiffs with regard to any communication between attorney and client that was related to the fund.

In summary, the plaintiffs may obtain discovery from USX that is related to USX's actions as a fiduciary to the Fund without regard to the attorney client privilege. USX was acting as a fiduciary whenever it exercised discretionary authority or control over the management or administration of the plan through actions of its employees or pursuant to the 1978 Agreement. Pertinent here are USX's actions relating to payments into or out of the Fund in response to the change in the corporate leave policy. The plaintiffs may not obtain discovery from USX, by application of the *Garner* principle, of matters related to the Company in its corporate capacity, such as the change of the corporate leave policy.

The court is fully conscious that no "bright line" can be neatly drawn between those times when USX acted in its corporate role and those times when it acted in its fiduciary role. The court, however, expects a good faith effort on the part of all parties to implement the opinions and directions expressed herein. Should the need arise, the parties, of course, may submit questionable discovery requests to the court. In this regard, however, all the parties are advised that the court intends to ruthlessly implement the sanctions authority provided in the rules. Foolish or unreasonable disputes will be met with swift and sure retribution.

II.B.2. The Crime-Fraud Exception to the Attorney-Client Privilege.

The attorney-client privilege does not protect communications made in furtherance of a crime or fraud. *In re Grand Jury Investigation (Schroeder),* 842 F.2d 1223, 1226 (11th Cir. 1987).

> In deciding whether the crime-fraud exception applies to a communication between a lawyer an his client, courts apply a two part test. First, there must be a prima facie showing that the client was engaged in criminal or fraudulent conduct when he sought the advice of counsel, that he was planning such conduct when he sought the advice of counsel, or that he committed a crime or fraud subsequent to receiving the benefit of counsel's advice. Second, there must be a showing that the attorney's assistance was obtained in furtherance of the criminal or fraudulent activity or was closely related to it.

Schroeder, 842 F.2d at 1226 (citations omitted). "The first prong is satisfied by a showing of evidence that, if believed by a trier of fact, would establish the elements of some violation that was ongoing or about to be committed." *Id.* The second prong is satisfied by a showing that the communication is sufficiently related to the criminal or fraudulent activity established under the first prong. *Id.* at 1227. The requirement that legal advice must be related to the client's criminal or fraudulent conduct should not be interpreted restrictively *Id.* at 1227. *See In re Grand Jury,* 845 F.2d 896, 898 n.5 (11th Cir. 1988). The attorney need not be aware he was assisting his client in committing a crime or fraud for the exception to apply. *Schroeder,* 842 F.2d at 1227. The party "seeking to breach the walls of privilege" must establish the elements of the exception. *Id.* The

crime-fraud exception applies to the attorney-client privilege and to work product. *In re International Systems & Controls Corp. Secur. Litigation,* 693 F.2d 1235, 1242 (5th Cir. 1982).

The plaintiffs argue that the first prong of the test is met because USX violated 29 U.S.C. §186 by making illegal pension payments to six Union officials. Section 186 provides in pertinent part:

> (a) It shall be unlawful for any employer or . . . any person . . . who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value-
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or
>
> (2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or
>
> (3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or
>
> (4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer or employee of such labor organization

29 U.S.C. § 186. It seems clear that the plaintiffs will be able to show that on October 22, 1984, USX revised its leave of absence policy to provide that persons leaving the company to accept positions with the Union could ask for leaves of absence "for a longer period of time" than the previous two year maximum. The revision provided that anyone who left USX for employment by the Union prior to January 1, 1978 and remained employed with the Union on February 29, 1984 and who "continuously have held positions servicing bargaining units at the U.S. Steel division in which he had been employed," was eligible to apply for an extended leave of absence. There is evidence that the new policy was proposed by J. Bruce Johnston, executive vice president of employee relations for USX, in response to requests or demands of Union officials involved in the 1983 negotiations of the Fairfield Works Agreement. The evidence tends to show that six Union officials, E. B. Rich, Thermon Phillips, Ralph Gurley, Carl Statum, Virgil Pearson and Fred Shepherd, received USX pensions as a result of the change in the leave policy. USX rescinded the change in its leave of absence policy as of May 14, 1987. Since May 22, 1988, the Fund has paid pension payments for the six Union officials into escrow accounts. The evidence presents a prima facie violation of 29 U.S.C. § 186(a)(4). In their reply brief, plaintiffs also allege a "conspiracy to conceal the violations of 29 U.S.C. 186" continuing to the present time. The plaintiffs have nowhere set out the prima facie elements of this claim, nor have they shown the court any prima facie evidence of such a conspiracy, or attempted a good faith statement of the evidence which might establish the conspiracy. "[M]ere allegations of criminality are insufficient to warrant application of the exception." *Schroeder,* 842 F.2d at 1226.

The defendants argue that the plaintiffs have not established a connection between the specific communications sought to be discovered and the commission of the alleged Taft-Hartley Act violations. With regard to defendant's claim that the communications must be "temporally related" to the violation, plaintiff has produced evidence that Union officials approached the Company about the leave of absence change and the pensions sometime in 1983, that the Company instituted the leave of absence policy in October 1984, and caused the Fund to pay pensions to the six Union officials until May 1988. Any advice sought from attorneys after the cessation of payments of the pensions would have been related to past, completed acts. But communications between USX and its attorneys which occurred between the date the Union negotiators first proposed the pensions and the date USX finally ceased payment of the pensions would seem to be sufficiently related in time and chronology to the Section 186 violations. *Pritchard-Keang Nam Corp. v. Jaworski*, 751 F.2d 277 (8th Cir. 1984), *cert. dismissed*, 472 U.S. 1022, 105 S.Ct. 3491, 87 L.Ed.2d 625 (1985) does not support defendants' argument that the communications must have occurred within a particular period of time near to the crime or fraud. The "timing" factor of *Pritchard-Keang* could as easily refer to chronology or sequence at it could to proximity. *Pritchard-Keang*, 751 F.2d at 281. Furthermore, the *Pritchard-Keang* court disallowed discovery of the communication at issue for the reason that it was "not furnished in furtherance of a fraud," and not because the communication was written and delivered several months before the fraud. *Id.* Proximity in time is relevant to the determination of whether a communication is "related" to the crime or fraud, but so is the sequence of events and the subject matter of the communication. *See Schroeder*, 842

F.2d at 1227 (purpose of second prong is to identify communications that should not be privileged because they were used to further a crime or a fraud . . . the requirement should not be interpreted strictly). As defendants point out, mere coincidence in time between the alleged crime and the attorney-client communication does not satisfy the "relatedness" prong, but neither does the lack of close proximity in time conclusively prove there is no relationship between the communication and the crime.

There is no basis, either in logic or reason, to narrow the "relatedness" prong of the test to require that communications be closely related in time to USX's action in rescinding the change in its leave of absence policy in October 1987. The Taft-Hartley violations continued for at least another six months until the date the direct pension payments ceased. *See United States v. Cohen,* 384 F.2d 699, 700 (2nd Cir. 1967), *citing United States v. Alaimo,* 297 F.2d 604 (3rd Cir. 1961), *cert. denied,* 369 U.S. 817, 82 S.Ct. 829, 7 L.Ed.2d 784 (1962); *United States v. Keegan,* 331 F.2d 257 (7th Cir. 1964), *cert. denied,* 379 U.S. 828, 85 S.Ct. 57, 13 L.Ed.2d 37 (1964). The evidence establishes a prima facie case of criminal wrongdoing on the part of the Company from sometime prior to October 22, 1984 to May 1988.[7]

II.B.3. Waiver of the Attorney-Client Privilege.

Plaintiffs claim USX waived its right to assert the attorney-client privilege because it raised a "good faith" defense in *United States v. USX, et al.,* CR 89-HM-253-S,

[7] The cases cited refer to payments made by an employer pursuant to one single agreement. The court is aware the payments here were made by the Fund, and not by USX. Nevertheless, the Company had control over the policy, so that payments fromthe Fund could have been terminated by USX at any time.

because USX admitted pension payments for the six Union officials were being paid into escrow "on the advice of counsel;"[8] and because J. Bruce Johnston testified at his deposition that he relied on the advice of counsel "and his own judgment" in determining whether Section 186 applied to USX's leave of absence policy. Plaintiffs claim that *United States v. Exxon Corp.*, 94 F.R.D. 246 (D.D.C. 1981) and *Panter v. Marshall Field & Co.*, 80 F.R.D. 718, 721 (N.D.Ill. 1978) support their claim of waiver.

At the outset, the court notes USX claims it has not raised a defense of good faith reliance on advice of counsel as an affirmative defense in this matter. That it did so in the related criminal case is of no consequence here. In *Panter*, the court noted "[d]efendants do not seriously contend that they do not rely heavily upon an 'advice of counsel' defense . . ." When defendants in this action responded to certain of plaintiffs' discovery requests with statements that they relied upon advice of counsel in certain circumstances, they were not raising a defense, they were stating a fact. Nothing in their responses even hinted that they were putting their intent and knowledge of the law into issue in this case.[9] In the absence of any indication

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[8]USX has been permitted by the court to amend its responses to requests for admissions to delete references to advice of counsel.

[9]The plaintiffs have asserted that the Company's position in this case, that its leave of absence policy was lawful, is inconsistent with its position in an earlier case, that the policy was unlawful. USX argues that its position was never inconsistent, that it claimed earlier that the policy might violate the law because the law had changed after the institution of the policy, but that it has never changed its initial position that the policy was lawful. To the extent USX's claim implicates the advice of counsel, it was nevertheless not presented as a defense to the substantive claims in this case. Nothing in what USX said in this regard implicates a *reliance* on advice or implicates USX's intent in implementing the leave of absence policy.

that such a defense has been raised, the *Panter* circumstances constituting waiver are not present.

The Company says it will claim it believed the policy was legal when adopted based on "(1) statements by the government, such as the Opinion Letter dated July 12, 1977 from Steven J. Sacher, Associate Solicitor, Department of Labor, Plan Benefit Division, to William N. Wheat & Associates, and other Department of Labor communications; (2) decisions by courts and arbitrators; (3) the pervasiveness of similar policies in the steel industry and in numerous other industries; and (4) the absence of any prosecutions or even any raised government eyebrows despite such pervasiveness. (USX's October 31, 1990 reply memorandum). USX and the Fund further acknowledge that they have placed at issue their intent with respect to compliance with Taft-Hartley. Thus, the defendant has impliedly "raise[d] an affirmative defense that makes his intent and knowledge of the law relevant," *Exxon*, supra. In *Exxon*, the court held defendant's affirmative defense of "good faith reliance" on the government's regulations and communications was a waiver of the privilege. In this case USX has categorically denied that proof of its intent with regard to the Taft-Hartley violations will involve disclosure of attorney client communications. *See, e.g. In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel,* 666 F.Supp. 1148, 1151 (N.D. Ill. 1987). Nevertheless, USX's defense that it intended to act in compliance with the law necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change. As the *Exxon* court noted, the waiver must pertain to all documents bearing upon the

subject matter of the defense, otherwise, the party interposing the defense is free to divulge only those documents that are most favorable to his defense. *United States v. Exxon Corp.*, 94 F.R.D. 246, 249 (D.D.C. 1981). Here, it would be inequitable to allow USX to present evidence tending to show that it intended to comply with the law, while allowing it to cloak in privilege those documents tending to show it might have known its actions did not conform to the law. Therefore, the court will order the disclosure of those communications which bear on USX's knowledge of the law relating to the institution and revocation of the leave of absence policy, without regard to the attorney client privilege. Disclosure will be limited, however, to the time period between the date the Union officials first proposed they be paid Company pensions to the date USX ceased the direct payments on May 22, 1988.

Plaintiffs also allege USX waived its right to assert the attorney-client privilege by making "selective disclosures" of legal opinions that were included as exhibits to some depositions of USX officials. The Company concedes that a selective disclosure of some privileged documents would waive the attorney-client privilege with respect to the subject-matter of the disclosed documents, but argues the disclosure of two privileged documents by USX counsel was inadvertent.

The documents at issue are two memoranda from in-house counsel, James Carney, to J. Bruce Johnston. Defendants admit they were produced on July 17 and July 19, 1989, one at the deposition of T.W. Sterling, and one at the deposition of J.D. Short. (Plaintiffs' appendix of September 20, 1990 at pp. 153, 285). Plaintiffs aver the memoranda were subpoenaed by the government for use in the criminal trial, and one of them was admitted into evidence

at the trial. The defendants submitted a copy of the affidavit of F.A. Flowers, III, dated February 7, 1990, apparently created for the criminal case. Mr. Flowers stated he inadvertently produced the documents in question on March 24, 1989, when he produced a total of 584 pages of documents in response to plaintiffs' March 3, 1989 request for production of documents which consisted of some twenty-seven pages. Mr. Flowers represents he was also preparing responses to plaintiffs amended complaint, 27 page request for admissions, and 27 page set of interrogatories. He stated that he examined the documents he produced on two different occasions, but the two privileged documents at issue were, nevertheless, produced. Plaintiffs have not disputed any of Mr. Flowers' statements.

The court is not persuaded by the cases cited by defendants' wherein a showing of inadvertence alone was found to defeat a claim that the privilege was waived. Once the document is no longer confidential, it is more rational to require the party claiming there was no waiver to show the inadvertent disclosure occurred despite reasonable precautions. *See, e.g. Parkway Gallery Furniture, Inc. v. Kittinger/Pennsylvania House Group, Inc.*, 116 F.R.D. 46, 50-52 (M.D.N.C. 1987).[10] In this case, USX has shown the

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[10]Courts employing this rule consider five factors in determining whether a document has lost its privilege through inadvertent disclosure:

(1) The reasonableness of the precautions taken to prevent inadvertent disclosure in view of the extent of document production;

(2) the number of inadvertent disclosures;

(3) the extent of the disclosures;

(4) any delay and measures taken to rectify the disclosures; and

(Continued on next page)

timetable created by plaintiffs put them under great pressure to make timely responses to pleading and discovery requests at the time the documents were produced. Defendants inadvertently produced only two documents out of a total of 584 pages. The procedure of examining the documents twice seems to be an adequate precaution against disclosure. However, the documents are clearly privileged on their face, and they concern matters directly touching on this suit and on the criminal trial. Furthermore, there is no evidence of record that USX ever initiated any attempt to retrieve the documents until the Flowers affidavit was filed nearly a year after the documents were produced. The extent of the disclosure was significant, since the documents were examined by government counsel during the criminal trial, and one of them was submitted as evidence. In these circumstances, the court concludes USX waived the attorney-client privilege as to those documents already produced.

In the usual case, waiver of the privilege with regard to a specific communication also waives the privilege with regard to other communications relating to the same subject matter. However, the extent of the waiver is limited in the case of inadvertent disclosure, unless it is obvious a party is attempting to gain an advantage or make offensive or unfair use of the disclosure. *Parkway Gallery*, 116 F.R.D. at 52. Although plaintiffs claim the disclosures are "self-serving," the court does not find them so. For example, the April 14, 1987 letter reveals J. Bruce Johnston was told the leave of absence policy was probably unlawful on that date. That preceded by a year the date USX stopped

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(Continued)

(5) whether the overriding interests of Justice would or would not be served by relieving a party of its error.

See Parkway Gallery, 116 F.R.D. at 50.

making direct payments to Union officials pursuant to the policy.

The defendants have not claimed or attempted to prove the disclosure of plaintiff's exhibits 108, 111, and 20 was inadvertent, therefore the court agrees there was a waiver with regard to the documents that were privileged and the subject matter of those documents. However, the court does note exhibit 108, a letter from J.D. Short to Thermon Phillips is not a document which would have been protected by the attorney-client privilege. Therefore, plaintiffs' claim that defendants waived the privilege with regard to the subject matter therein by virtue of producing the document is not well-founded. Furthermore, the court notes plaintiffs have not submitted exhibit 79 or discussed it in brief. The court therefore expresses no opinion with respect to document 79.

Finally, plaintiffs claim this court should find the defendants waived the attorney client privilege in this case because Judge Haltom found that the defendants had waived the privilege in the criminal case. The plaintiffs have access to the transcripts and exhibits in the criminal trial, and the privilege is waived with regard to the subject matter of any documents introduced in the earlier proceeding. However, this court does not find the circumstances here warrant a finding that the defendants waived the privilege for all purposes.

II.C. The Attorney Work Product Rule.

Another limitation on the scope of the discovery rules is the so-called "attorney's Work Product Rule." Rule 26(3), Fed.R.Civ.P. provides:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

For purposes of this case, the rule does several things. It provides for discovery of (1) documents and tangible things (2) prepared in anticipation of litigation or for trial (3) by an opponent's attorney or representative (4) upon a showing of substantial need (5) that cannot without undue hardship (6) be substantially obtained by other means. It absolutely protects "mental impressions, conclusions, opinions, or legal theories of an attorney . . . of a party concerning the litigation."

The rule does not require, in order to qualify materials for the privilege, that litigation must actually have begun. In modern America wise persons anticipate that litigation will likely occur and prepare for it. Documents prepared

before "litigation has formally commenced are protected if there is a substantial probability that litigation will occur and that commencement of such litigation is imminent." *Homes Ins. Co. v. Ballenger Corp.*, 74 F.R.D. 93, 101 (N.D.Ga. 1977). So long as prospective litigation is identifiable, documents and tangible things prepared in its anticipation will be afforded the protection of the rule. *Stix Prods., Inc. v. United Merchants & Mfrs., Inc.*, 47 F.R.D. 334, 337 (S.D. N.Y. 1969). "[L]itigation need not necessarily be imminent . . . ." *United States v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981), *rehearing denied*, 645 F.2d 71 (1981). It is sufficient that the subject of discovery requests are "materials prepared by an attorney 'acting for his client in anticipation of litigation.' " *United States v. Nobles*, 422 U.S. 225, 237-38, 95 S.Ct. 2160, 2169, 45 L.Ed.2d 141 (1975), quoting *Hickman v. Taylor*, 329 U.S. 495, 508, 67 S.Ct 385, 392, 91 L.Ed. 451 (1947). Further, there is no requirement that the materials be prepared for use in the litigation presently pending before this court. *FTC v. Grolier, Inc.*, 462 U.S. 19, 25-27, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983).

II.D. Miscellaneous Objections to Discovery.

The defendants object that various discovery requests are burdensome and oppressive, not likely to lead to admissible evidence, request conclusions of law, or are unintelligible.

II.D.1. Oppressive and Burdensome Requests.

Under Rule 26(b)(1), the court may limit discovery:

> if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking

> discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the discovery is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation.

In considering objections based upon the burdens imposed in responding to discovery requests, the court must balance the requesting party's need for the information against that burden. *Rich v Martin Marietta Corp.*, 522 F.2d 333, 343 (10th Cir. 1975). One who seeks discovery must tailer his request to the particular needs of the particular litigation. *Mack v. Great Atlantic & Pacific Tea Co.*, 871 F.2d 179, 187 (1st Cir. 1989). Objections on the basis of burdensomeness must be "plain and specific enough so that the court can understand in what way the [discovery sought]... [is] alleged to be objectionable." *Panola Land Buyers Asso. v. Shuman*, 762 F.2d 1550, 1559 (11th Cir. 1985), (quoting *Davis v. Fendler*, 650 F.2d 1154, 1160 (9th Cir. 1981)). *Also see, Josephs v. Harris Corp.*, 677 F.2d 985 (3rd Cir. 1982), (quoting *Roesberg v. Johns-Manville Corp.*, 85 F.R.D. 292, 296-97 (E.D. Pa. 1980)) ("party resisting discovery 'must show specifically how... each interrogatory is not relevant or how each question is overbroad, burdensome or oppressive....' ").

II.D.2. Likely to Lead to Admissible Evidence.

Rule 26, Fed.R.Civ.P. is generously construed to provide wide latitude for discovery. *Harris v. Nelson*, 394 U.S. 286, 89 S.Ct. 1082, 22 L.Ed.2d 281 (1969), rehearing denied, 394 U.S. 1025, 89 S.Ct. 1623, 23 L.Ed.2d 50 (1969). Soon after the adoption of the Federal Rules of Civil Procedure, the United States Supreme Court spoke to the wide scope of discovery established by those rules.

> [T]he deposition-discovery rules are to be accorded a broad and liberal treatment. No longer can the time-honored cry of "fishing expedition" serve to preclude a party from inquiring into the facts underlying his opponent's case. Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge *whatever facts* he has in his possession. The deposition-discovery procedure simply advances the stage at which the disclosure can be compelled from the time of trial to the period preceding it, thus reducing the possibility of surprise.

Hickman v. Taylor, 329 U.S. 495, 507-508, 67 S.Ct. 385, 392, 91 L.Ed. 451 (1947).

Broad discovery, however, does not mean unlimited discovery. The requested information must be "relevant" to the "subject matter" of the action with relevancy having a somewhat broader meaning than is generally attributed to that term for evidentiary purposes at trial. *Independent Productions Corp. v. Loew's Inc.*, 30 F.R.D. 377, 381 (D.C.N.Y. 1962).

> The key phrase in this definition—"relevant to the subject matter involved in the pending action"—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case . . . [D]iscovery is not limited to issues raised by the pleadings, for discovery itself is designed to help define and clarify the issues.

Oppenheimer Fund, Inc. v. Sanders, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253, 265 (1978) (citations omitted).

The party seeking discovery carries the burden to clearly demonstrate that the discovery sought is relevant to

the subject matter of the law suit and would likely lead to evidence that would be admissible in that lawsuit. *McClain v. Mack Trucks, Inc.*, 85 F.R.D. 53, 57 (E.D. Pa. 1979); *Pierson v. United States*, 428 F.Supp. 384, 390 (D. Del. 1977). A general or conclusory statement that the requested discovery material is relevant is not sufficient in the face of a specific objection. *Home Ins. Co. v. Ballenger Corp.*, 74 F.R.D. at 101.

II.D.3. Miscellaneous Remaining Objections.

The rules do not permit discovery requests which call upon opposing parties to state their own conclusions of law. *Weddington v. Consolidated Rail Corp.*, 101 F.R.D. 71, 75 (N.D. Ind. 1984); *O'Brien v. International Brotherhood of Electrical Workers*, 443 F.Supp. 1182 (N.D. Ga. 1977). *See also, Joseph v. Norman's Health Club, Inc.*, 336 F.Supp. 307, 319 (E.D. Mo. 1971) ("The final sentence of Rule 33(b) . . . does not authorize interrogatories calling for legal conclusions as such.")

That no party can be compelled to respond to a request for discovery that no reasonable person can understand is so obvious as to require no further comment.

III. Application of Legal Principles to Specific Discovery Requests.

III.A. The Motion to Compel Production.

III.A.1. USX asserted an attorney-client privilege and work product privilege in response to some requests. USX produced several documents for this court's *in camera* inspection, and the court is satisfied that the documents so produced are confidential communications between attorneys and their corporate client, and therefore protected under the attorney-client privilege in absence of any of the

exceptions asserted by plaintiff. *In re Grand Jury Investigation (Schroeder)*, 842 F.2d at 1225. The specific document requests include:

III.A.1.a. documents related to the benefits or pension credit paid under the Company's extended leave of absence policy to Rich, Phillips, Gurley, Statum, Pearson and Shepherd from the year 1983 to present. (Request Number 3).

The application of the *Garner* doctrine nullifies the attorney-client privilege with respect to documents in this category, and documents responsive to the request should be produced.

III.A.1.b. documents and legal memoranda prepared by corporate counsel concerning the extended leave of absence policy. (Request Number 24).

The *Garner* doctrine does not apply to abrogate the attorney-client privilege, but the defendants have waived the privilege to the extent these documents reveal the knowledge of USX regarding the legality of the corporate leave of absence policy. With respect to the documents produced for *in camera* inspection, documents 3, 4, and 5 were created outside of the relevant time period and the defendant has not waived the privilege with respect to those documents. However, documents 1 and 2 are germane to USX's knowledge of the law relating to the leave of absence policy and are within the relevant time frame. Therefore, USX has waived the attorney client privilege with respect to those documents. Document 6 is protected by the attorney work product privilege.

The crime-fraud exception to the attorney-client and work product privileges does not apply to documents three, four, five or six. Documents three, four and five are

not sufficiently related in time to the alleged Section 186 violations, and there is no possibility those documents were created or used to further the Section 186 violations. Although document 6 is related in time to the Section 186 violations, the advice contained therein was not advice which the defendants could have used to further Section 186 violations.

III.A.1.c. copies of settlement agreements and checks concerning the case of *Emmett Bruce Thrasher v. United Steelworkers of America, AFL-CIO-CLC, et al.*, CV 86-G-1930-S. (Request Number 32).

USX has not produced any of the documents related to the *Thrasher* suit for *in camera* inspection, and it has not established that all the requested documents were confidential. Any *Thrasher* documents which were not confidential to USX and its counsel, such as documents examined by *Thrasher* or other plaintiffs, plaintiffs' counsel, the court, or other third parties, are not protected by the attorney-client privilege. Although the court agrees the work product rule applies to materials prepared in litigation other than the litigation presently pending before this court, *FTC v. Grolier, Inc.*, 462 U.S. 19, 25-27, 103 S.Ct. 2209, 76 L.Ed.2d 387 (1983), the settlement documents were not "prepared in anticipation of litigation or for trial," and they are not, therefore, protected by the attorney work-product rule. Rule 26(b)(3), Fed.R.Civ.P.[11]

The Garner doctrine does not apply to the requests for documents related to the *Thrasher* litigation. The plaintiff in the *Thrasher* litigation asserted claims against USX in its fiduciary capacity, but, nevertheless, USX's settlement

[11]The defendants have not claimed the settlement documents are under a court-ordered protection.

of the suit has not been shown to have had an effect on the Fund's assets. Although plaintiffs have produced some evidence that the settlement amount of the *Thrasher* lawsuit was based on the pension *Thrasher* would have received under the pension agreement, there is no evidence the settlement came out of pension funds or was in any way related to the administration of the fund. Settlement of the suit had nothing to do with USX's fiduciary duties in "administration" or "management" of the plan. Therefore, USX's actions in settling the lawsuit do not implicate its fiduciary obligations and the *Garner* doctrine. Any confidential documents involving communications between USX and its attorneys related to the settlement are protected by the attorney-client privilege.

The crime-fraud exception clearly does not apply to communications related to the settlement of the *Thrasher* litigation. Although the settlement was reached in April 1987, while alleged Section 186 violations were occurring, there is no evidence from which this court could reasonably conclude the advice related to settlement of litigation was "used to further [the] crime or fraud" of violating Section 186. Schroeder, 842 F.2d at 1227. Plaintiffs have not established that "concealment" of Section 186 violations is a crime or fraud, nor have they set out the legal elements of such a concealment or presented prima facie evidence meeting those elements.

The attorney-client privilege is waived with regard to any *Thrasher* documents which bear on USX's knowledge of the law relating to the leave of absence policy.

Finally, defendants argue in brief that the *Thrasher* documents are irrelevant to the issues in this case. The information is relevant in that it may lead to evidence regarding USX's knowledge of the legality of the leave of

absence policy prior to the date on which USX revoked the policy.

III.A.1.d. USX internal memoranda concerning the extended leave of absence policy. (Request Number 33).

The only documents in this category which would be protected by the attorney client privilege or the work product privilege are those discussed under section III.A.1.b above, i.e., requested documents 3, 4, 5 and 6. The motion will otherwise be granted.

III.A.1.e. documents reflecting the Union's or the Company's official position concerning the legality of the leave of absence policy. (Request Number 47).

USX has waived the attorney client privilege with respect to documents which reveal its knowledge of the legality of the leave of absence policy.

III.A.1.f. correspondence or memoranda from January 1, 1983 to date, from or to Johnston, relating to the leaves of absence or pensions. (Request Number 70).

The attorney client privilege is waived with respect to documents that were created in the time period between the date the Union officials first proposed the leave of absence policy and the date USX revoked the policy on May 22, 1988. Privileged documents created outside those dates will not be discoverable under the waiver exception, and the crime fraud exception does not apply since there is no indication documents created prior to the date of the Union officials' demand or after the date the payments ceased would have been used in furtherance of a crime or fraud. Finally, the Garner doctrine does not apply to these documents related solely to the leave of absence policy.

III.A.2. USX claimed the following requests were "oppressive, burdensome and unlikely to lead to the discovery of admissible evidence:"

III.A.2.a. Request Number 8, in which plaintiffs ask for all agendas, lists of items to be negotiated or discussed, and notes of negotiations between defendants from January 1, 1980 to present. USX objects to the request except for notes already produced which were related to the Fairfield Agreement of December 24, 1983. The court agrees the request is burdensome to the extent documents relating to other negotiations and contracts are requested, and plaintiffs' motion to compel will be denied with respect to request number 8.

III.A.2.b. Request Number 11, asking for the names and addresses of persons affected by the Fairfield Works Agreement and subsequent proceedings. The parties agree this request is moot. The court previously ordered defendants to provide plaintiffs' with the names and addresses of apparent class members.

III.A.2.c. Plaintiffs' request for all documents showing any persons who receive benefits under the current 1987 collective bargaining agreement and associated pension plans. (Request Number 16). The Company objects to plaintiffs' request for documents of "any person." The request is burdensome insofar as it requests documents relating to all persons. USX shall respond to the request with regard to any Union officials who, in addition to the named Union officials, received benefits under the 1987 collective bargaining agreement or the pension plan.

III.A.2.d. Plaintiffs' request for "any and all papers . . . associated with the negotiations or discussions

that took place between Rich, Phillips, R.L. Walls, William Miller, and or Johnston concerning the Fairfield Words from 1983 to present." (Request Number 21). USX states it submitted the backup documents related to the 1983 negotiations, but it claims the remainder of the negotiations are beyond the scope of the action. The material is discoverable if it is "reasonably calculated to lead to the discovery of admissible evidence." Rule 26(b)(1), Fed.R.Civ.P. The documents relating to negotiations at the Fairfield Works which were conducted while those Union officials doing the negotiating were receiving USX pensions are pertinent here. USX has claimed that the search for the documents will be burdensome, but in view of the limitation of the request to documents related to the 1983 negotiators and the Fairfield Works, the plaintiffs motion to compel will be granted as to request number 21.

III.A.2.e. all documents prepared by the Company in connection with the negotiation or implementation of the Fairfield Works Agreement which show wage or labor concessions or written projections reflecting the Company's savings from concessions. (Request Number 22). USX represents in brief that it is attempting to comply with the request, therefore plaintiffs' motion to compel will be denied.

III.A.2.f. Request Number 35, asking for copies of all collective bargaining agreements and local agreements, including attachments and notes, between the Company and the Union from the year 1980 to present. USX claims the request is oppressive with respect to documents other than the Fairfield Works Agreement and related agreements. The court agrees local agreements at unrelated locations are irrelevant and unlikely to lead to relevant evidence. The defendants shall produce all documents

responsive to the request that are related to the Fairfield Works, not limited to the Fairfield Works Agreement.

III.A.2.g. Request Number 38, asking for all documents relating to statements made by Rich, Gurley, Statum, Phillips, Pierson, Shepherd or any other Union official that in any way relates to the matter complained of in this litigation from the years 1983 to present. USX objects to this request to the extent it requests information about Union officials other than the named individuals. Although USX has claimed there is a substantial burden in checking with employees, the court notes plaintiffs have a substantial interest in determining the extent of Union knowledge and involvement in the leave of absence policy and the pensions. On balance, the court finds the plaintiffs' position well-taken, and their motion to compel will be granted with respect to request number 38.

III.A.2.h. Request Number 42, asking for all Fairfield (local) collective bargaining agreements affecting wages and benefits of employees of the Fairfield Works from the year 1980 to present. Plaintiffs correctly point out that the previous agreements are relevant in showing the changes worked by the 1983 agreement. USX will be ordered to produce the earlier agreements that are responsive to the request.

III.A.2.i. Request Number 53, asking for documents revealing the amount of incentive pay provided for certain unspecified jobs, and documents showing the percentage above the incentive calculation rate which was used to calculate indirect incentive pay or secondary indirect incentive pay for those jobs, and the date each job qualified for indirect or secondary indirect pay. The request is relevant in that the information will provide a point of comparison with regard to the incentive pay established in

the 1983 agreement. However, USX indicated in brief that it had previously produced the documents it believes are responsive to the request, and plaintiffs' motion will therefore be denied with respect to request number 53.

III.A.3. USX claims the following requests are unintelligible:

III.A.3.a. Request Number 25, in which plaintiffs ask for "[a]ll documents that were made, produced or executed, including any memoranda or understanding or similar or like documents that arose from any negotiations made before or during the negotiations regarding the 1983 Fairfield Works Agreement or any other subsequent, if any, Fairfield Works Agreement."

III.A.3.b. Request Number 26, in which plaintiffs ask for "[a]ll documents that show any monies that have been paid or received by Thermon Phillips, E.B. Rich, Ralph Gurley, Carl Statum, Virgil Pearson; and/or Fred Shepherd from the Company regardless of whether those documents are characterized as reflecting pension monies or monies from some other source and/or as the result of any negotiations or letters or memoranda of understanding."

III.A.3.c. Request Number 37, asking for "all documents in the possession, custody and control of the Union or the Company, including memoranda concerning any meetings, statements or conversations between [Phillips, Rich, Gurley, Statum, Pierson, Shepherd] or any other Union official and any other person concerning or relating to in any manner pension benefits, pension credit service, pension negotiations, payment of monies and the possible receipt of monies or benefits from the Company or the

Fund under the Company's extended leave of absence policy made effective on February 29, 1984 from the year 1983 to the present."

III.A.3.d. Request Number 61, asking for documents describing, listing and classifying the jobs available at the Fairfield Works from December 24, 1983 to present.

III.A.3.e. Request Number 68, asking for documents reflecting correspondence, memoranda or reports to management (or instructions from management) of the Company in the possession, custody or control of the Company which relates to or concerns the negotiations between representatives of the Company and representatives of the Union which culminated in the December 24, 1983 Fairfield Works Agreement or any exhibits or amendments or supplements thereto and which were prepared by or sent to the management of the Company or to any representative of the Company who participated in the negotiations or approved any proposal or agreement made by the Company in negotiations with E.B. Rich and Thermon Phillips which culminated in the December 24, 1983 Agreement, or any exhibit or supplement or amendment thereto.

Plaintiffs' motion to compel will be denied with respect to the requests defendants claim are unintelligible. The court notes plaintiffs have further expanded on their requests in brief, and suggests the plaintiffs accordingly revise their requests and resubmit them to the defendants in a more precise form.

III.B. The Motion to Compel Answers to First Interrogatories.

III.B.1. USX objects to Interrogatory Number 10 as calling for a conclusion of law, and not likely to lead to admissible evidence. Plaintiffs asked USX to state whether

it contended the USX Leave of Absence policy as revised on October 22, 1984 violated 28 U.S.C. § 186. The request calls for an application of law to the facts of this case, not for an abstract opinion of the law. Such requests are specifically allowed by Rule 33(b), Fed.R.Civ.P. The issue here was extensively discussed in the court's opinion related to the plaintiffs requests for admissions, entered on November 13, 1990. The plaintiffs' motion to compel will be granted with respect to interrogatory number 10.

III.B.2. USX objected to the following interrogatories on the grounds of attorney-client privilege and the work product doctrine:

III.B.2.a. Interrogatory number 76, seeking information about the *Thrasher* settlement. This subject is related to the Plaintiffs' document requests discussed above, and no further discussion is necessary.

III.B.2.b. Interrogatory number 80, requesting that USX disclose the dates of an investigation into the claims involved in this lawsuit conducted by F.A. Flowers, USX's attorney, and "what prompted the investigation, who ordered the investigation, and to whom each report concerning any such investigation was submitted."

The attorney-client privilege applies only to protect confidential communications between a lawyer and his client, not underlying facts. *Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584, 595 (1981). The privilege therefore applies to what was said to F.A. Flowers by USX employees during the course of the investigation referenced in plaintiffs' interrogatories. *Upjohn, supra.* Nevertheless, the privilege does not protect the facts surrounding the investigation, such as who ordered it, when it took place, what prompted it, and who received the

reports. *Id.* These facts do not involve communications between Flowers and USX. USX cannot refuse to disclose relevant facts within its knowledge merely because its attorney was also privy to those same facts. The plaintiffs have not requested the notes or memoranda made by Flowers during the course of the investigation or thereafter. Documents and tangible things prepared in anticipation of litigation or for trial, by or for a party or that party's representative, including the party's attorney, consultant, surety, indemnitor, insurer, or agent constitute attorney work product, Rule 26(b)(3), Fed.R.Civ.P., and the notes and memos created by Flowers during the investigation would therefore be attorney work product.

The investigation, undertaken after the inception of this litigation, is clearly protected by the work-product rule. The Garner exception to the attorney-client privilege does not apply to attorney work-product. *Donovan,* 90 F.R.D. 587-588. Furthermore, plaintiffs have not demonstrated "substantial need" of the materials Flowers compiled and inability to obtain the substantial equivalent by other means without undue hardship. Rule 26(b)(3), Fed.R.Civ.P.

The plaintiffs allege they learned of the Flowers investigation in December 1988, and defendants allege in brief the investigation occurred in "late 1988." Plaintiffs have the burden of proof on this issue, and there is nothing in this record which would show the court the investigation occurred prior to the termination of the Taft-Hartley violations. In fact, from the present record, it appears the investigation occurred after the defendants ceased making pension payments to the Union officials. Therefore, the crime-fraud exception to the attorney client privilege does not apply to the Flowers investigation.

Finally, the Flowers investigation does not implicate USX's knowledge about the legality of the leave of absence policy during the time it was in force, and therefore the privilege is not waived with respect to the investigation.

Plaintiffs' motion to compel defendants to answer interrogatory number 80 will therefore be denied, to the extent it calls for the information Flowers gathered during the investigation. Nevertheless, defendants must tell plaintiffs when the investigation took place, who ordered it, what prompted it and who received the results.

III.B.2.c. Interrogatory number 98, requesting that USX reveal its reasons for failing to report the pensions on Form LM-10 to the United States Department of Labor, including any advice of counsel upon which the company relied, the identity of counsel, and the documents relating to the advice.

Since the attorney-client privilege applies only to protect communications between an attorney and his client, USX's reasons for failing to file the Form LM-10 report are not protected by that theory. Neither is the identity of counsel providing advice to USX. However, the privilege applies to the substance of the advice provided by counsel and the documents related to that advice.

Plaintiffs represent United States Department of Labor Form LM-10 requires an employer to report therein the payment of money or thing of value made to any officer, agent or other representative of a union. The failure to file Form LM-10 does not implicate USX's fiduciary obligations as administrator of the fund, since the duty to file the report arose only from its status as an employer, and the Garner doctrine does not apply.

Although plaintiffs allege the form LM-10 request relates to "concealment" of violations, again the court must point out they have failed to establish a prima facie case of a crime or fraud based on concealment, and the privilege is therefore not affected by the crime-fraud exception.

However, to the extent the advice provided about form LM-10 relates to USX's knowledge about the legality of the leave of absence policy, the privilege is waived. The court does not have access to the advice USX received, and so, does not decide whether the information is discoverable despite the privilege, due to the waiver implicated by USX's defense in this action.

III.B.3. USX objected to the following interrogatories as being oppressive, burdensome, and unlikely to lead to the discovery of admissible evidence:

III.B.3.a. Interrogatory number 28, asking for the identity of USX personnel who prepared, typed, or did other clerical work related to the applications for leaves of absences for Rich, Phillips and others, and the dates on which the work was done. Plaintiffs claim they may find information about the concealment of the leaves of absence policy from the Union rank-and-file. This request is unduly burdensome, and the plaintiffs should now be able to conduct more efficient discovery along these lines from the questioning of the USX officials who administered the plan. Therefore, the motion will be denied with respect to interrogatory number 28.

III.B.3.b. Interrogatory number 32, asking for information about communications with Union officials concerning the leave of absence policy. USX objected to the interrogatory insofar as it requested information about

communications after January 1987 when large numbers of Union officials asked for information. To the extent USX has records of such communications, they are relevant and should be produced to the plaintiffs. However, USX contends it has produced all the information it has in response to a request for documents. Plaintiffs have made no showing, in the face of this assertion, that they believe some other records of communications exist. Therefore, plaintiffs' motion to compel will be denied with respect to interrogatory number 32.

III.B.3.c. Interrogatory number 43, seeking information about any Union official who requested a leave of absence for longer than two years between July 1983 and May 14, 1987. USX represents that it has produced all the documents related to all the individuals, but plaintiffs contend some documents have not been produced, referring to the testimony of Jack Parton at the criminal trial. The plaintiffs' motion to compel will be granted to the extent USX has any information about Mr. Parton's leave of absence. The court will assume USX's assertion it has no more information responsive to plaintiff's request is made in good faith, and it will not compel USX to produce information it claims it does not have.

III.B.3.d. Interrogatory number 60, again asks for the names of clerical persons who handled the documents related to the leaves of absence and the pensions. The court will deny the plaintiffs' motion to compel, finding it unduly burdensome in light of the plaintiffs' ability to depose those USX officers primarily responsible for the Fund.

III.B.3.e. Interrogatory number 84 and interrogatory number 85 ask for records of telephone conversations or other communications between Lynn Williams or other

Union officials and J. Bruce Johnston or other Company officials concerning the revised leave of absence policy. USX represents it has no responsive information other than that already produced. Plaintiffs' motion to compel a further response will therefore be denied.

Plaintiffs represent in brief that they are satisfied with USX's response to interrogatory number 39, and that interrogatory number 96 is moot. With respect to interrogatory number 57, which defendants claim is unintelligible, plaintiffs' motion to compel will be denied without prejudice to plaintiffs' right to revise the interrogatory and resubmit it to defendant USX.

III.C. The Motion to Compel Certain Officers of USX to Answer Questions Propounded at Their Depositions.

Plaintiffs previously attempted to depose J. Bruce Johnston, formerly USX's Executive Vice President, Employee Relations; Thomas W. Sterling, Vice President, Employee Relations for the USS division of USX; William Miller, Jr. formerly USX's Vice President, Labor Relations; and James R. Short, or "J. D." Short, formerly USX's Vice President, Benefits Administration and formerly the Fund's Vice President, Administration. Plaintiffs represent in their motion that all asserted an attorney-client privilege to plaintiffs questions about communications between the deponents and counsel regarding: (1) the Union's demand, through Union officials, for long term leaves of absence and the payment of pensions and other things of value by USX and the Fund; (2) the Company's decision to amend its leave of absence policy to allow leaves of absence in excess of two years; (3) the Fund's

decision to pay pensions to Union officials; (4) the decision of USX to revoke its long term leave of absence policy (but not retroactively as to the six); and (5) the Fund's later decision to pay the pensions granted six Union officials into interest bearing escrow accounts.

As outlined above, the privilege surrounding those communications related to USX's amendment of its leave of absence policy is not affected by application of the *Garner* doctrine, but communications regarding payments of benefits out of the Fund or other administration of the plan do lose their privileged status. The court is aware that although Mr. Short was an employee of USX, his duties were primarily related to administration of the Fund. Because of his position, all communications to Mr. Short regarding the pension plan in general would be related to administration of the Fund or come under the category of legal advice to the Fund pursuant to the 1978 Agreement, regardless of whether the communication related to amendment of the leave of absence policy or to payment of benefits out of the plan. Mr. Short may not assert an attorney-client privilege with respect to any question related to his administration of the Fund, including any legal advice received from USX attorneys.

Defendant represents that Messrs. Johnston and Sterling had no authority to make the decision to pay benefits out of the Fund, but could merely advise the Fund regarding that question. The court agrees that conversations between these men and their attorneys, in themselves, could have no relationship to the administration of the Fund if Messrs. Johnston and Sterling could not affect administration of the Fund. However, plaintiff has presented evidence that Johnston was a member of the Board of Directors of the Fund. Any action he took in his

capacity as a member of that board would be in a capacity as a Fund fiduciary, not solely as a USX employee, whether or not he had authority to unilaterally cause the Fund to pay the pension benefits. If Johnston sought legal advice in his capacity as a member of the Fund Board of Directors, rather than in his capacity as USX's 75a Executive Vice President, that communication would be discoverable under the *Garner* doctrine. Therefore, Johnston's communications with counsel regarding the Union officials' demand for the change of USX's leave of absence policy, or to USX's decision to change, and later revoke, its leave of absence policy are not related to the administration of the Fund, and are not affected by the *Garner* doctrine. However, communications related to the decision to pay pensions to the Union officials, and the later decision to pay the six pensions into escrow accounts are not protected attorney-client communications. Therefore, with respect to plaintiffs' questions about the Fund's decision to pay pensions to Union officials and the Fund's later decision to pay the pensions granted six Union officials into interest bearing escrow accounts, the *Garner* doctrine nullifies any attorney-client privilege related to those communications.

Sterling and Miller's attorney client communications would not be discoverable under the *Garner* doctrine, absent evidence connecting them with administration of the Fund.

Communications occurring after the question of USX pensions for Union officials was first raised at the Fairfield negotiations and prior to the cessation of pension payments from the fund are reasonably related in time and chronology to the alleged Taft-Hartley violations. Any communications prior to the negotiations would not be

sufficiently "related" to the violations, and any communications after the cessation of direct payments to the defendants would be related to past acts. In either case the crime-fraud exception does not apply.

Plaintiffs represented in their motion that all of the questions at issue concern communications between USX and its attorneys. The evidence shows USX sought legal advice regarding its plan to amend its leave of absence policy and to pay pension benefits to Union officials throughout the time it was planning and implementing the policy. Nevertheless, there is no evidence that the legal advice was used to implement the plan, or somehow furthered USX's violations. The court is aware that the requirement that legal advice must be related to the client's criminal or fraudulent conduct should not be interpreted restrictively. *Schroeder*, 842 F.2d at 1227. Nevertheless, the requirement cannot be completely ignored. With respect to the privileged communications at issue here, plaintiffs have not pointed to any evidence which would show USX used the advice of attorneys to further an illegal scheme. The only connections between the advice and the Section 188 violations is the timing and the subject matter of the advice. There is no other relation. There is no evidence that shows USX could not have acted without the legal advice, or that the legal advice materially advanced the alleged criminal scheme. From the evidence presently before the court, the crime-fraud exception does not affect USX officials' right to assert the attorney-client privilege when questioned about confidential attorney-client communications.

USX has waived the attorney client privilege with respect to any communications made after the Union officials' demand for USX pensions and prior to the revocation of the leave of absence policy, which bear on USX's knowledge of the legality of the leave of absence plan. To the extent plaintiffs' questions call for such communications, the deponents must answer. The generalized nature of the information before this court does not permit a specific determination regarding whether plaintiffs' questions about the Union officials' demand for pensions, USX's decision to amend its leave of absence policy, or USX's decision to revoke the policy implicate the waiver found here. In general, the court notes questions about the Union officials' demand, even if transmitted through attorneys, are not privileged absent a confidentiality of communication. Any advice concerning the legality of the proposal is discoverable whether it was provided during the negotiations, when the Company changed the leave of absence policy, or when the Company revoked the policy. Finally, questions regarding advice to the Fund are not protected by the privilege.

IV. Conclusion.

A separate order in conformity with this opinion will be entered.

Done this 28th, of November, 1990.

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

APPENDIX C
Entered December 5, 1990

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a U.S. STEEL CORPORATION, et al.,
Defendants.

CV-88-N-2069-S

ORDER

In accord with the memorandum of opinion previously entered on November 28, 1990, it is hereby ORDERED as follows:

A. Plaintiffs' Motion to Compel Production.

1. Request Number 3, the motion is **GRANTED;**

2. Request Number 24, the motion is **GRANTED** with respect to documents 1 and 2 which were produced for in *camera* inspection. The motion with respect to Request Number 24 is otherwise **DENIED.**

3. Request Number 32, the motion is **GRANTED** with respect to any *Thrasher* documents which were not confidential communications between attorney and client, and any other documents which reveal USX's knowledge of the legality of the pension plan during the relevant time.

the motion with respect to Request Number 32 is otherwise **DENIED.**

4. Request Number 33, the motion is **GRANTED** with respect to documents 1 and 2 which were produced for in *camera* inspection, the motion with respect to Request Number 33 is otherwise **DENIED.**

5. Request Number 47, the motion is **GRANTED** with respect to all such documents created during the relevant period and relating to USX's knowledge of the legality of the leave of absence policy, the motion with respect to Request Number 47 is otherwise **DENIED.**

6. Request Number 70, the motion is **GRANTED** with respect to documents created during the relevant period and relating to USX's knowledge of the legality of the leave of absence policy, the motion with respect to Request Number 70 is otherwise **DENIED.**

7. Request Number 8, the motion is **DENIED.**

8. Request Number 11, the motion is **MOOT.**

9. Request Number 16, the motion is **GRANTED** with respect to documents relating to Union officials, and is otherwise **DENIED.**

10. Request Number 21, the motion with respect to Request Number 21 is **GRANTED.**

11. Request Number 22, the motion with respect to Request Number 22 is **DENIED.**

12. Request Number 35, the motion is **GRANTED** with respect to documents related to the Fairfield Works, not limited to the Fairfield Works Agreement. The motion with respect to Request Number 35 is otherwise **DENIED.**

13. Request Number 38, the motion is **GRANTED.**

14. Request Number 42, the motion is **GRANTED.**

15. Request Number 53, the motion is **DENIED** with respect to Request Number 53.

16. Requests Numbers 25, 26, 37, 61, and 68, the motion is **DENIED** with respect to Requests Numbers 25, 26, 37, 61 and 68.

B. The Motion to Compel Answers to Interrogatories.

1. Interrogatory Number 10, the motion is **GRANTED** with respect to Interrogatory Number 10.

2. Interrogatory Number 76, the motion is **GRANTED** with respect to any communication that was not a confidential communication between attorney and client, and as to any information relating to USX's knowledge of the legality of the pension plan. The motion is otherwise **DENIED** with respect to Interrogatory Number 76.

3. Interrogatory Number 80, the motion is **GRANTED** with respect to information regarding when the investigation took place, who ordered it, what prompted it and who received the results. The motion is otherwise **DENIED** with respect to Interrogatory Number 80.

4. Interrogatory Number 98, the motion is **GRANTED** with respect to USX's reasons for failing to file Labor Form LM-10 and the identity of any counsel providing advice to the Company. The motion is otherwise **DENIED** with respect to Interrogatory Number 98.

5. Interrogatory Number 28, the motion is **DENIED** with respect to Interrogatory Number 28.

6. Interrogatory Number 32, the motion is **DENIED** with respect to Interrogatory Number 32.

7. Interrogatory Number 43, the motion is **GRANTED** with regard to USX's information about Mr. Parton, and the motion is otherwise **DENIED** with respect to Interrogatory Number 43.

8. Interrogatory Number 60, the motion is **DENIED** with respect to Interrogatory Number 60.

9. Interrogatories Numbers 84 and 85, the motion is **DENIED** with respect to Interrogatories Numbers 84 and 85.

10. With regard to Interrogatories Numbers 39 and 96 the motion is **MOOT.**

11. Interrogatory Number 57, the motion is **DENIED** with respect to Interrogatory Number 57.

C. The Motion to Compel Certain Officers of USX and Carnegie Pension Fund to Answer Depositions Questions.

1. The deponent, J. Bruce Johnston, may not assert the attorney-client privilege in response to questions concerning confidential communications with attorneys related to the Company's administration of the Fund; or confidential communications with attorneys, made in the time period between the date the Union officials first proposed they be paid Company pensions to the date USX ceased the direct payments on May 22, 1988, which were relevant to USX's knowledge regarding the legality of the leave of absence policy. The privilege is not waived with respect to other communications generally protected by the attorney-client privilege.

2. The deponent, James R. Short, or "J.D." Short, may not assert the attorney-client privilege in response to questions concerning confidential communications with attorneys related to the Company's administration of the Fund, or with respect to confidential communications by attorneys related to the leave of absence policy adopted by USX.

3. The deponents William Miller, Jr. and Thomas W. Sterling may not assert the attorney-client privilege in response to questions concerning confidential communications which were related to the Company's administration of the Fund, if they were parties to such communications. Neither may the deponents assert an attorney-client privilege with respect to questions related to communications made between the date Union officials first requested Company pensions to the date USX ceased the direct payments on May 22, 1988, which were relevant to USX's knowledge regarding the legality of the leave of absence policy. The privilege is not waived with respect to other communications generally protected by the attorney client privilege.

Done, this 4th of December, 1990.

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

Appendix D
Entered January 24, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LESLIE RAY COX, et al.,
Plaintiffs,
vs.
USX CORPORATION, a/k/a U.S. STEEL CORPORATION, a Delaware corporation, et al.,
Defendants.

CV-88-N-2069-S

MEMORANDUM OF OPINION

This cause is presently before the court on motion of defendants USX and the Fund for reconsideration of portions of this court's order of December 5, 1989, or in the alternative for certification for appeal pursuant to 28 U.S.C. §§ 1292(b), and plaintiffs' motion of January 7, 1991 requesting "appropriate relief" due to the defendants' refusal to produce the documents required by this court's December 5, 1990 order.

USX has asked the court to reconsider its determination that USX's defense causes a waiver of the attorney client privilege with respect to all attorney client communications bearing on USX's knowledge of the law. USX also asked the court to reconsider its determination that

the attorney client privilege was waived as to all communications involving Mr. J.D. Short, due to his position as administrator of the Fund.

I. The Motion for Reconsideration.

A. In its December 1990 opinion, this court held USX's defense, that it intended and believed its conduct in 1984 to be in compliance with the law, caused a waiver of the attorney client privilege as to communications bearing on USX's knowledge of the law. USX claims the privilege has not been waived, denying any reliance on the affirmative defense of "advice of counsel," and representing it will not offer any "exculpatory" advice of counsel. It now claims the matter is "not so much one of USX's intent in amending its leave of absence policy. The evidence in question is material in that it reveals the state of law in 1984 (i.e., goes to the question of legality per se)." Brief of USX, p. 6. (emphasis in original). The court agrees the evidence USX presented goes to the question of legality, and is relevant to that issue. However, USX's defense places into issue more than the question of legality, it raises the question of USX's corporate state of mind. Any evidence relevant to that question is therefore pertinent in this action, whether it is the evidence USX presented in support of its claim its actions were legal, or other evidence not yet revealed.

Furthermore, the court is not convinced waiver follows only where the party asserting the privilege has claimed ineffective assistance of counsel or reliance on advice of counsel. In *GAB* Business Services, Inc. v. Syndicate 627, 809 F.2d 755, 762 (11th Cir. 1987), the Eleventh Circuit found the privilege was waived where the plaintiff sought indemnity for a loss resulting from a settlement

The court noted the issues at the "very heart" of the litigation were the plaintiff's liability and the reasonableness of the settlement. *GAB*, 809 F.2d at 762, n. 11. In the circumstances, the court said application of the privilege would deny the opposing party access to information vital to his defense. *Id., citing Hearn v. Rhay,* 68 F.R.D. 574, 581 (E.D. Wash. 1975). In *Hearn v. Rhay*, the court held the attorney-client privilege was waived where defendant jailers asserted good faith immunity in a prison civil rights suit. *Hearn*, 68 F.R.D. at 580-583. In frequently quoted language, the court said:

> "All of these established exceptions to the rules of privilege have a common denominator; in each instance, the party asserting the privilege placed information protected by it in issue through some affirmative act for his own benefit, and to allow the privilege to protect against disclosure of such information would have been manifestly unfair to the opposing party. The factors common to each exception may be summarized as follows: (1) assertion of the privilege was a result of some affirmative act, such as filing suit, by the asserting party; (2) through this affirmative act, the asserting party put the protected information at issue by making it relevant to the case; and (3) application of the privilege would have denied the opposing party access to information vital to his defense."

Hearn, 68 F.R.D. at 581. All of those elements of implied waiver exist here. USX has injected the issue of its intent and knowledge of the law into this action,[1] and by doing so

---

[1]In its earlier opinion, this court noted USX's "good faith" defense in the related criminal case and its responses to certain discovery requests that it relied upon advice of counsel did not put its intent and knowledge of the law at issue in this case. Nevertheless, USX did state in brief that it will claim it believed its leave of absence policy was legal,

(Continued on next page)

USX made the information it gleaned from its attorney advisors relevant to the case.

Contrary to USX's assertion, the *Hearn* decision was not premised on a "reliance on advice of counsel defense."[2] The defense in question was that defendants "acted in good faith" and "that the decisions made by them regarding plaintiff's custody were discretionary acts of public officials for which they are immune from suit for damages." *Hearn*, 68 F.R.D. at 578. In fact, the *Hearn* defendants also argued the privilege should not be waived because they did not seek immunity on the basis of legal advice they received. 68 F.R.D. at 581-582, n. 5. The court responded, "[b]y asserting the defense in any manner, defendants impose on plaintiff the burden of proving malice or disregard of settled, undisputable law . . . Since legal advice received by defendants is highly probative of whether they acted with malice, plaintiff is entitled to discovery of such information to aid him in rebutting the defense . . . " Id. *See also Conkling v. Turner*, 883 F.2d 431

(Continued)

and that it intended to comply with Taft-Hartley. Those defenses, unlike the responses to discovery requests, placed the question of USX's knowledge of the law in issue in this case.

[2]USX cited *Connell v. Bernstein-Macaulay, Inc.*, 407 F.Supp. 420, 422 (S.D.N.Y. 1976), in support of this assertion. The *Connell* court did state that the party in *Hearn* had expressly relied on the advice of counsel as a defense to the plaintiff's action. Nevertheless, this court notes that, although the *Connell* court thought the holding of Hearn was not on point for that reason, it nevertheless found the *Hearn* reasoning persuasive and applied it to the case before it. Therefore the *Connell* court held where a plaintiff claimed the defendant was estopped from asserting a statute of limitations defense, and there was a good faith basis for believing that invasion of the attorney client privilege would shed light on the validity of the estopped claim, the party making such assertion was deemed to have waived the privilege. *Connell*, 407 F.Supp. at 422-23.

(5th Cir. 1989) (plaintiff injected into lawsuit the issue of when he knew or should have known of the falsity of a statement, and privilege is waived with regard to when attorney gave plaintiff reason to believe he had been defrauded, whether plaintiff supplied information relevant to that determination, the specifics of that information, and when it was supplied); *Russell v. Curtin Matheson Scientific, Inc.*, 493 F.Supp. 456 (S.D.Tex. 1980) (privilege waived where plaintiffs claimed 180 day notice requirement in 29 U.S.C. §§ 621 *et seq.* was equitably tolled because DOL misled plaintiffs, and there was evidence plaintiffs spoke with an attorney more than 180 days prior to filing suit); *Jack Winter, Inc. v. Koratron Company*, 50 F.R.D. 225 (N.D.Cal. 1970) (content of statements by attorney to officers of Koratron with respect to agreement were placed into issue by Koratron's claim the agreement was made under duress, and privilege was waived); *Pitney-Bowes, Inc. v. Mestre*, 86 F.R.D. 444 (S.D.Fla. 1980) (plaintiff's assertion that it intended to enter into modifications of patent licensing agreements placed the intent of the parties into issue and caused waiver of the privilege). *See also McLaughlin v. Lunde Truck Sales, Inc.*, 714 F.Supp. 916 (N.D. Ill. 1989).

Barr Marine Products Co. v. Borg-Warner Corp., 84 F.R.D. 631 (E.D.Pa. 1979), cited by USX, does not dictate a different result. That case involved the somewhat cryptic defense of "meeting competition." The court said the defense did not raise attorney-client communications as an issue. *Borg-Warner*, 84 F.R.D. at 635. The defendant in *Standard Chartered Bank PLC v. Ayala International Holdings (U.S.) Inc.*, 111 F.R.D. 76 (S.D.N.Y. 1986) asserted fraud as a counterclaim and the court found the question of the defendant's reasonable reliance did not

cause a waiver of the attorney-client privilege. The court noted the facts and business advice rendered by defendant's lawyers were not in any case protected by the privilege and legal advice was not relevant to the question of whether defendant knew or should have known of a fraud. *Ayala*, 111 F.R.D. at 80-81. The defendant's position in this case does make the legal advice rendered by its attorneys an issue, since it has asserted it intended to conform its actions to the law, and it believed it acted in compliance with the law. Finally, the court in *In re Consolidated Litigation Concerning International Harvester's Disposition of Wisconsin Steel*, 666 F.Supp. 1148 (N.D. Ill. 1987) would find waiver only if attorney-client communications were used in its defense by the one asserting the privilege. That procedure would allow the selective disclosure of only those communications favorable to the defense as long as it avoided all attorney-client communications. Therefore, defendant's motion for reconsideration of this court's finding that the attorney-client privilege has been waived with respect to communications bearing on USX's knowledge of the law will be DENIED.

B. The court previously held that USX was acting in its fiduciary capacity only when it exercised its authority and control to administer the Fund. The court concluded that Mr. Short, as USX's vice president for Benefits Administration, functioned as an administrator of the Fund, and that any legal advice provided to him would have been in his capacity as administrator or would have been legal advice to the Fund pursuant to the 1978 Agreement between USX and the Fund. The court had determined that whenever USX provided legal advice to the

Fund pursuant to the 1978 agreement, the fiduciary exception applied to nullify the attorney-client privilege. However, USX now represents to the court that Mr. Short has duties other than administration of the Fund, particularly with respect to involvement in negotiation of benefits in collective bargaining and plan amendment, plan termination or plan design. The court agrees that, if Mr. Short was involved in establishing, amending or terminating the plan, as opposed to managing the plan assets, he was not acting in a fiduciary capacity. Therefore, USX's motion to reconsider this court's opinion of December 5, 1990 must be GRANTED to the extent the court misunderstood Mr. Short's role with respect to the Fund. The attorney-client privilege is not, therefore, waived with regard to Mr. Short's communications with attorneys where it is clear that Mr. Short was acting only in his capacity as an employee of USX and not in his capacity as administrator of the Fund.

From the deposition extracts and testimony provided by the plaintiffs in response to this motion, it is apparent Mr. Short did seek some legal advice in his capacity as administrator of the Fund[3] and when he did so, his fiduciary duty to the plaintiffs is implicated and the privilege is not applicable. It is doubtful that Mr. Short considered whether he was acting as administrator or employer at the time he had communications with USX counsel, but his purpose in seeking the advice should provide some guidance, as would the use he made of the advice. Where plaintiffs can show Mr. Short's purpose in seeking legal

[3]For example, Mr. Short testified at his deposition that he asked for advice from the Law Department in 1984 regarding the leaves of absences, because he was concerned about the Fund's tax qualification. (Short deposition, pp. 191-193) Clearly, that advice was sought in his capacity as administrator of the Fund,

advice implicated his administrative duties, or that the advice was used in execution of his fiduciary duties, the privilege will not apply. Furthermore, the court is of the opinion that Mr. Short's role as administrator of the Fund placed him in a unique position with regard to any legal advice he received. Except when Mr. Short was seeking legal advice for some specific task he was undertaking in establishing the plan, bargaining, or other responsibilities related to his role as employer, it seems likely that information Mr. Short gathered about the pension plan was used both in his capacity as administrator and when he undertook duties on behalf of USX. As USX recently argued before this court, "it is very difficult for the human mind to compartmentalize and selectively suppress information once learned . . . " (USX brief in response to plaintiffs' motion to compel, filed December 18, 1990, p. 10, citation omitted). That is particularly true here, where there was no reason for Mr. Short to attempt to compartmentalize the information. Therefore, if plaintiffs can establish Mr. Short's communications were related to his Fund administrative duties, or that the information he received was used in his Fund administrative duties, they are entitled to discover the content of the communication. In such instances, Mr. Short's fiduciary status is implicated even if the advice was also used in discharging his duties as employer.

Therefore, the defendants' motion for reconsideration of this court's determination that the attorney-client privilege is waived with respect to all of Mr. Short's communications will be GRANTED. The privilege is waived only where the communication in question related to Mr. Short's duties as administrator of the Fund.

II. The Motion for Certification for Appeal Pursuant to 28 U.S.C. § 1292(b).

The question presented here is proper for certification for appeal pursuant to 28 U.S.C. § 1292(b). The legal question presented to this court, whether the attorney-client privilege is waived by a defense of good faith intent to comply with the law, is a question of first impression in this Circuit. Therefore, this court is of the opinion that its order of December 5, 1990 involves a controlling question of law as to which there is a substantial ground for difference of opinion. *See Garner v. Wolfinbarger*, 430 F.2d 1093, 1097 (5th Cir. 1970), *cert. denied sub nom Garner v. First American Life Ins. Co.*, 401 U.S. 974, 91 S.Ct. 1191, 28 L.Ed.2d 323 (1971). The circumstances of this action are not substantially different from those in *Garner*, where the Fifth Circuit found immediate appeal would materially advance the ultimate termination of that litigation when the decision "would affect the scope of the evidence in a complex case, even short of requiring complete dismissal." *Id.* at 1097, *United States v. Woodbury*, 263 F.2d 784 (9th Cir. 1959).

The courts' order of December 5, 1990 will be stayed pending the outcome of the appeal, in so far as it relates to a finding that USX's defense works a waiver of the attorney client privilege.

III. Plaintiffs' January 7 Motion for Sanctions.

The plaintiffs request that the court strike the answers of USX and the Fund, as sanctions for USX's failure to produce the documents as ordered on December 5, 1990. Having considered that USX and the Fund filed a the motion for reconsideration of the order, the court finds that the sanction requested by the plaintiffs would not be

just. Rule 37(b)(2), Fed.R.Civ.P. Nevertheless, USX's and the Fund's refusal to produce the documents coupled with their failure to seek a stay of the order pending the resolution of the motion to reconsider was not substantially justified. Therefore, the court will require that USX and the Fund pay the reasonable expenses caused by the failure. Rule 37(b)(2)(E), Fed.R.Civ.P. Plaintiffs shall submit its request for costs supported by affidavit within ten days. USX and the Fund may respond fifteen days thereafter.

The court finds the parties' positions on this motion were substantially justified, and therefore costs will not be apportioned pursuant to Rule 37(a)(4), Fed.R.Civ.P.

Done, this 24th of January, 1991.

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

Entered January 24, 1991

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

LESLIE RAY COX, et al.,
Plaintiffs,
vs.
USX CORPORATION, a/k/a
U.S. STEEL CORPORATION,
a Delaware corporation, et al.,
Defendants.

CV-88-N-2069-S

ORDER

In accordance with the memorandum of opinion entered contemporaneously herewith, the defendants' motion for reconsideration, filed is GRANTED IN PART and DENIED IN PART. The December 5, 1990 order is hereby MODIFIED to provide that, as to Mr. J.D. Short, attorney-client privilege is waived only as to those communications related to Mr. Short's administration of the Fund.

The defendants alternative motion for certification pursuant to 28 U.S.C. §§1292(b), is GRANTED.

The courts' order of December 5, 1990 is hereby STAYED pending the outcome of the appeal, in so far as it relates to a finding that USX's defense works a waiver of the attorney client privilege.

Plaintiffs motion of January 7, 1991 for sanctions is GRANTED. Plaintiffs shall submit their request for costs supported by affidavit within ten days of the date of entry of this order. Defendants may respond within fifteen days thereafter.

Done, this 24th of January, 1991.

EDWIN L. NELSON
UNITED STATES DISTRICT JUDGE

Appendix E

LESLIE RAY COX; R.M. COX; LARRY DRIVER; BARRY NICHOLS; JOHN BULLARD; ROBERT W. KENNEDY, JR.; LORENZO G. EAST; CLARENCE M. POPE, JR.; C.R. ALTES; JACK E. MERRYMON; TERRY P. WEST; R.S. ARNOLD; M.W. MILSTEAD; J.W. WADE; MANNING A.C. SNIDER; TERRY H. MELVIN; THOMAS E. HILL; GARY D. SWANN; RONALD E. FRAZIER; ANTHONY J. CRAPET; ROBERT M. GREEN; HEATH L. MCMEANS, III; BILLY CARTER; JOE A. KNIGHT; PHILLIP L. DRUMMOND; BRACK WELLS; GEORGE BOGLIN; DENNIS E. JONES; DENNIS R. FULTON; DON L. FLURRY; W.T. MAYBERRY; WILLIE YOUNG; ROBERT POOLE; WARDELL CLARK; WILLIE J. NATION; OSCAR LEE PERRY; HARRY S. TURNER AND JAMES R. MILLER, suing individually and on behalf of a class of similarly situated individuals, etc.,
Plaintiffs-Appellees, Cross-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE AND UNITED STATES STEEL & CARNEGIE PENSION FUND,
Defendants,

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,
Defendants-Appellants, Cross-Appellees.

LESLIE RAY COX; R.M. COX; LARRY DRIVER; BARRY NICHOLS; JOHN BULLARD; ROBERT W. KENNEDY, JR.; LORENZO G. EAST; CLARENCE M. POPE, JR.; C.R. ALTES; JACK E. MERRYMON;

TERRY P. WEST; R.S. ARNOLD; M.W. MILSTEAD; J.W. WADE; MANNING A.C. SNIDER; TERRY H. MELVIN; THOMAS E. HILL; GARY D. SWANN; RONALD E. FRAZIER; ANTHONY J. CRAPET; ROBERT M. GREEN; HEATH L. MCMEANS, III; BILLY CARTER; JOE A. KNIGHT; PHILLIP L. DRUMMOND; BRACK WELLS; GEORGE BOGLIN; DENNIS E. JONES; DENNIS R. FULTON; DON L. FLURRY; W.T. MAYBERRY; WILLIE YOUNG; ROBERT POOLE; WARDELL CLARK; WILLIE J. NATION; OSCAR LEE PERRY; HARRY S. TURNER AND JAMES R. MILLER, suing individually and on behalf of a class of similarly situated individuals, etc.,

Plaintiffs-Appellants,

v.

ADMINISTRATOR UNITED STATES STEEL & CARNEGIE AND UNITED STATES STEEL & CARNEGIE PENSION FUND, UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC AND USX CORPORATION, a/k/a UNITED STATES STEEL CORPORATION,

Defendants-Appellees.

Nos. 91-7215, 92-6218

August 19, 1994

Before ANDERSON and CARNES, Circuit Judges, and SCHLESINGER*, *District Judge.*

ON PETITIONS FOR REHEARING AND SUGGESTIONS FOR REHEARING EN BANC

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*Honorable Harvey E. Schlesinger, U.S. District Judge for the Middle District of Florida, sitting by designation.

PER CURIAM:

Upon consideration of the petitions for rehearing, the opinion issued on April 5, 1994, and published at 17 F.3d 1386, is modified as follows:

(1) The second paragraph of section II.B.1.b, which is found at 17 F.3d at 1398, and begins "Under § 1962(c) it is unlawful . . . ", is deleted. In its place is substituted the following paragraph:

> Under §1962(c) it is unlawful for "any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." USX argues that a jury could not find a violation of that subsection because USX cannot be both the "person" and the "enterprise" contemplated by §1962(c). However, the plaintiffs have alleged only that USX conducted the affairs of the Fairfield Works, the Union, District 36 of the Union, and the Fund through a pattern of racketeering activity—not that USX conducted its own affairs through a pattern of such activity. We conclude that the pension fund is an enterprise separate from USX. The Supreme Court recently reemphasized that "'[t]here is no restriction upon the associations embraced by the definition: an enterprise includes any union or group of individuals associated in fact.'" *National Org. for Women, Inc. v. Scheidler,* 114 S. Ct. 798, 805 (1994) (quoting *United States v. Turkette,* 452 U.S. 576, 580, 101 S. Ct. 2524, 2527 (1981)). In *Davis v. Mutual Life Ins. Co. of New York,* 6 F.3d 367 (6th Cir. 1993), an insurance company was held liable under this section of the statute

for participating in the affairs of an independent insurance agency composed of agents of the insurance company engaged in the business of selling policies issued by the insurance company. The Sixth Circuit held that the agency was a separate enterprise from the insurance company. The agency had a separate existence, its own board of directors, and conducted its own business. We conclude that the pension fund in the instant case is even more separate and distinct from USX than were the two entities in *Davis*. The pension fund has a separate corporate existence; it is a nonprofit membership corporation. Its existence is not dependent upon USX, and could, for example, continue long after USX went out of business. The pension fund has its own governance, which is controlled and regulated by comprehensive statutory and regulatory provisions. Thus, the governance of the pension fund is separate and distinct from that of the corporation itself. Persons are involved in a pension fund who would have no involvement in the corporation with which it is associated at all; for example, a pension fund has investment advisors and actuaries as fiduciaries. Although both USX and its employees have a role in the pension fund, the role of each in the pension fund is distinct and different from the respective role each has in the corporation itself. For example, the corporation is administrator of the pension fund, but of course its role as administrator is very different from its role in its corporate existence; its role as administrator is constrained by all of the numerous ERISA statutes and regulations. Similarly, the employees of the corporation have a different role with respect to the pension fund; there, they are participants with rights regulated by the comprehensive statutory and regulatory scheme.

(2) The final sentence in the third paragraph of section II.B.3.a, which is found at 17 F.3d at 1404, and begins "As discussed in subpart B.1.b., above, . . . ", is deleted.

The petitions for rehearing are otherwise denied, and no member of the panel nor other judge in regular active service on the court having requested that the court be polled on rehearing *en banc,* the suggestions for rehearing *en banc* are denied.

Supreme Court, U.S.
FILED
NOV 23 1994
OFFICE OF THE CLERK

(2)

No. 94-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION,
Petitioner (defendant below),

v.

LESLIE RAY COX, *et al.*,
Respondents (plaintiffs below).

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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58pp

QUESTION PRESENTED

Where a corporate defendant creates self-serving documents with a view to establishing its good faith intent to comply with the law, and in a subsequent civil action voluntarily produces those self-serving exculpatory documents and asserts in the Pretrial Order that it had acted with good faith intent to comply with the law, can the corporate defendant rely on the attorney-client privilege to preclude plaintiffs from discovery of information necessary to rebut and challenge defendant's good faith defense?

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No. 94-721

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

USX CORPORATION,
Petitioner (defendant below),

v.

LESLIE RAY COX, *et al.*,
Respondents (plaintiffs below).

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Counterstatement of the Case

I. Statement of Facts.

In the fall of 1983, USX Corporation ("USX") and the United Steelworkers of America ("Union") negotiated a local agreement (the "FWA") at USX's Fairfield Works facility.[1] The

[1] USX states that in June 1982, it idled the operations at Fairfield Works as a result of losing $90 million during the first six months of that year. (Pet., p. 2.) Another explanation was that USX was undergoing construction of a new Pipe Mill at Fairfield Works, which was scheduled for completion in late December 1983, and idled operations at Fairfield Works to facilitate construction of a bloom caster and other facilities for the new Pipe Mill.

Union negotiators, Rich and Phillips, high-ranking officials of the Union, requested at the first negotiating session that they and other specified Union officials receive extended leaves of absence from USX retroactive to the last day of their employment at USX (in Phillips' case more than 30 years) and pension benefits from the United States Steel and Carnegie Pension Fund ("Fund") based on that extended leave of absence. Neither the Pension Fund Agreement nor the Basic Labor Agreement between USX and the Union (which provided a maximum 2 year leave of absence) permitted award of such retroactive extended leaves of absence or pension benefits to Union representatives. The Union negotiators' request for retroactive leaves of absence and pension benefits was considered and acted upon by Roderick (USX's CEO), Corry (USX's present CEO), Thomas (USX's CFO), Johnston (USX's Executive Vice President), Graham (USX's President), Miller (USX's Vice President and chief negotiator), Carney (one of USX's counsel), Short (the Fund's Vice President of Administration and USX's Vice President of Employee Benefits), Magistri (Short's assistant) and other USX officials.[2]

On December 24, 1983, when Rich and Phillips refused to sign the FWA Agreement without a favorable reply from USX as to their pension request, Miller and Carney spoke with Johnston on the phone. Johnston immediately thereafter outlined very specific and detailed terms under which USX would agree to the Union representatives' pension request. Miller assured Rich and Phillips that their request "would be considered favorably." (USX App. A, pp. 22a-23a.)

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[2] In 1990, USX was convicted of conspiracy to influence Union officials and violations of 29 U.S.C. § 186, mail-fraud and violations of ERISA, for granting and paying extended leaves of absence and pension benefits to the six Union representatives. The Eleventh Circuit affirmed USX's conviction, *United States v. Phillips*, 19 F.3d 1565 (11the Cir. 1994), and USX has filed a Petition for Writ of Certiorari.

After being told on December 29, 1983 that the Union officials' request would be granted, Short expressed concern about the propriety of granting the Union officials' request, sought advice from Carney and M. G. Heatwole (USX Assistant General Counsel), and, in January 1984, attended a lunch meeting with several of USX's counsel to discuss the issue. Short took notes of his meeting with USX counsel (which have not yet been produced for examination by the Court or plaintiffs' counsel).

From January through November 1984, Johnston, Short and Carney considered the method by which to fulfill USX's commitment to the Union officials. USX granted retroactive extended leaves of absence to the six Union officials by a secret amendment of USX's Leave of Absence Policy by USX's Corporate Policy Committee ("CPC") (a committee of USX's highest management officials). (App. F, pp. 15a-18a; USX App. A, pp. 22a-25a.) Carney, with assistance from Short and Johnson, prepared all drafts and the final proposal submitted to USX's CPC by Johnston and approved by the CPC on October 22, 1984. (App. D, pp. 8a-9a.)[3] Johnson testified that from 1983-1988 he relied on the advice of USX counsel in making decisions

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[3] USX, in its Petition, describes its 1984 Leave of Absence Policy as a "policy [which] permitted a defined class of persons to receive pension service credit." (USX Pet., p.1.) However, USX's 1984 amended leave of absence policy, which at USX's own insistence was held illegal in *Toth v. USX Corp.*, 693 F. Supp. 693 (N.D. Ill. 1988), *aff'd*, 883 F.2d 1297 (7th Cir. 1989), *cert. denied*, 493 U.S. 994 (1989), (1) was not prospective, but retrospective, in application (*only Union officials who had left USX's employ before January 1, 1978 were eligible*); (2) placed approval of a Union official's request for leave of absence in the sole *discretion* of Johnston (responsible for USX's collective bargaining); (3) was not publicized or otherwise disclosed to any Union representative (other than the FF Six); and (4) was adopted pursuant to a confidential and unilateral corporate procedure. (App. F, pp. 15a-18a.) *Only* the six Union officials received extended leaves purportedly pursuant to this "policy." However, even under the amended 1984 policy, only one of the six was qualified. USX was convicted for mail-fraud on this basis.

concerning USX's grant of extended leaves of absence and pension benefits to the Union representatives. In November 1984, the Fairfield Six began receiving from the Fund monthly pension payments, and health and insurance benefits, retroactive to March 1, 1984, the effective date of the FWA.

USX never notified any other Union official of this "policy" and did not, until five months later, notify the Union of any change. In March 1985, Johnston wrote Williams (the Union's President) in a strangely vague letter that a change in USX's Leave of Absence Policy had been made and that six Union officials had received USX pension benefits pursuant to that change. Johnston did not include a copy of the "policy," describe the "policy" or even identify the six Union officials.

USX states in its Petition (p.5) that "the issuance of the *Trailways* decision . . . caused USX to reexamine that policy [as amended in 1984]." Although *Trailways Lines, Inc., v. Trailways, Inc., Joint Counsel of Amalgamated Transit Union, AFL-CIO-CLC,* 785 F.2d 101 (3d Cir. 1986), *cert. denied,* 47 9 U.S. 932 (1986), was issued in March 1986, and the district court opinion had been issued in February 1985, USX's rescission of the 1984 policy did not occur until May 1987, more than one year later, and USX did not begin paying the pensions into escrow until June 1988, over two years after the *Trailways* decision.

In 1986, Union representative Bruce Thrasher filed suit against USX and the Union claiming that he was entitled to receive pension benefits from USX. Prior to any discovery being taken, Thrasher's action was settled in March 1987. Thrasher agreed to dismiss his Complaint against the Union and USX and to keep the matter confidential. Thrasher was paid by USX an amount (approximately $89,000) equal to the present value of a USX pension benefit calculated based on an extended leave of absence.

In the spring of 1987, however, USX began receiving numerous requests for pension benefits from other Union representa-

tives. On May 14, 1987, the CPC rescinded the 1984 amended Leave of Absence Policy, stating that the law department concurred in its action. (App. H, pp. 21a-23a.) USX denied all requests from the other Union representatives. Johnston wrote a letter, dated April 28, 1987, to Williams stating that USX was *rescinding its 1984 policy because USX had been advised by counsel that "granting such leaves of absence (or accepting such leaves of absence) violates the prohibitions of Section 302 of the Labor Management Relations Act.*" (App. G, pp. 19a-20a.) Moreover, in its answer to one of the plaintiffs' interrogatories in this action, USX stated:

> USX did not believe it had the authority under ERISA to take away pensions once granted and for this reason did not believe it could take away leaves of absence which formed the basis for the grant of such pensions. (App. D, p. 12a.)

In 1988, Union representative Andrew Toth filed an action against USX in Chicago seeking USX pension benefits based on the 1984 policy. USX defended that action, and on September 1, 1988, obtained an order dismissing the action, on the grounds that the 1984 leave of absence policy was illegal under 29 U.S.C. § 186. *Toth*, 693 F. Supp. 693 (N.D. Ill. 1988). In June 1988, USX notified the Fairfield Six that USX would begin paying the Union officials' pension benefits into an escrow account because "we have now been advised by outside counsel that continued payment of pension to you, in light of current legal developments, could possibly subject you and the defendants in these actions [USX and the Union] to criminal liability." (App. L, pp. 30a-31a.)

USX had, of course, been aware of 29 U.S.C. § 186 since its enactment. In 1976, USX (by its general counsel D. B. King) and the Union (by its special counsel Elliott Bredhoff) requested "an opinion by the Department of Justice as to the legality under Section 302 of the Labor Management Relations Act (29 U.S.C. § 186) of implementing" an amendment to the pension agree-

ment qualifying Union representatives for deferred vested pension benefits, and wrote the Department of Justice as follows:

> . . . under this proposal the only period of time used to compute pension benefits would be that period *actually* spent as an employee of U.S. Steel. *No* period after leaving employment of U.S. Steel would be considered in determining the amount of pension, and *no* credit would be given for time spent in employment with the Union. In short, the rights conferred would be in recognition of past work for U.S. Steel only. [Emphasis original.]

After the 1986 lawsuit was filed by Bruce Thrasher, USX created certain exculpatory self-serving documents (the April 1987 letter to Williams, App. G, pp. 19a-20a; the May 1987 CPC proposal, App. H, pp. 21a-23a; and the 1988 letters to the Union representatives, App. L, pp. 30a-31a), which have been voluntarily produced by USX in this action, including the following: (a) an April 14, 1987 legal memorandum from Carney to Johnston recommending that the extended leave of absence policy be abolished (App. I, pp. 24a-25a); and (2) a September 14, 1987 legal memorandum from Carney to Johnston purporting to analyze the extended leaves of absence granted to the Union representatives in light of certain court decisions, including *Trailways Lines, Inc. v. Trailways, Inc., Joint Counsel of Amalgamated Transit Union, AFL-CIO-CLC,* 785 F.2d 101 (3d Cir. 1986), *cert. denied,* 479 U.S. 932 (1986) (App. J, pp. 26a-27a).

Other documents created by USX's counsel, Carney, which have been produced by USX include: (1) a document drafted by Carney in 1984 which purports to be a proposed "letter agreement" between Williams (Union's President) and Johnston as to extended leaves of absence for Union representatives; (2) a CPC leave of absence proposal drafted by Carney and an August 1984 memorandum from Carney to Short discussing a "unilateral" approach as opposed to a "letter agreement" (App. F, pp. 13a-14a.) (3) handwritten notes of Carney taken during an October

1983 negotiating meeting in which Rich and Phillips requested extended leaves of absence; and (4) a September 3, 1987 set of notes by Carney of a meeting held between Union representatives Andrew Toth, John Foley and John Eckman and USX officials J. Bruce Johnston, J. D. Short and Jim Carney (App. K, pp. 28a-29a).

On May 15, 1989, USX responded to plaintiffs' interrogatories and requests for admissions concerning USX's payment of pension benefits into escrow by stating that monthly benefits for Union officials Rich, Phillips, Statum, Gurley, Pearson and Shepherd were being paid into escrow accounts "based on the advice of counsel." (App. C & D, pp. 6a-7a, 10a-11a.) On August 25, 1989, without leave of court, USX amended its response to the request for admissions deleting the above language, and on November 13, 1990, USX obtained leave of court to amend its admissions. USX has never amended or sought to amend its May 15, 1989 answers to plaintiffs' interrogatories.

2. Proceedings Below.

In its April 3, 1989 Memorandum in support of its Motion to Dismiss plaintiffs' Complaint, USX stated:

> At the time the amended policy was adopted, USX believed that the policy was lawful. . . . USX decided to rescind the amended leave of absence policy in May 1987 because it believed that, based on *Trailways Lines, Inc. v. Trailways, Inc. Joint Council,* 785 F.2d 101 (3d Cir.), *cert. denied,* 479 U.S. 732 (1986), *continuation* of the policy *might* constitute a violation of Section 302. (App. B, pp. 4a-5a.)

The November 2, 1989 Pretrial Order in this action includes the following statement of USX's position, which was drafted by USX:

> At the time the Company's revised leave of absence policy was adopted and implemented in October 1984, almost one

> year after the Fairfield Agreement was signed, the Company believed the policy to be lawful. The Company believed the policy to be lawful since it was merely an extension, with certain modifications, of its two-year leave of absence policy for Union officials contained in § 13-J of the Basic Labor Agreement between the Company and the Union which had been in effect for a number of years, and which the Union had sought to extend beyond the two-year period for over ten years. When the revised policy was implemented, there were no court decisions declaring such policies unlawful. (App. A, pp. 2a-3a.)

In its November 1990 Opinion overruling USX's attorney-client privilege objection, the district court below held:

> USX's defense that it intended to act in compliance with the law necessarily implicates all of the information at its disposal when it made the decision to change the leave of absence policy and later, to rescind the change. (USX App. B, p. 98a.)

In its January 1991 Opinion, denying USX's Motion for Reconsideration, the district court held:

> The defendant's position in this case does make the legal advice rendered by its attorneys an issue, since it has asserted it intended to conform its actions to the law, and it believed it acted in compliance with the law. (USX App. D, p. 173a.)

USX did not appeal to the Eleventh Circuit the holdings of the district court below that (1) pursuant to *Garner v. Wolfinbarger*, 430 F.2d 1093, (5th Cir. 1970), *cert. denied*, 401 U.S. 974 (1971), USX, the Administrator of the Fund, cannot assert the attorney-client privilege as to communications relating to USX's administration of the Fund (USX App. B, pp. 83a-91a; USX App. D, pp. 137a-139a), and (2) USX waived the attorney-client

privilege as to (a) certain attorney-client communications which USX claimed it had inadvertently produced to plaintiffs' counsel, and (b) certain other attorney-client communications voluntarily produced by USX and all related attorney-client communications or communications on the same subject matter (USX App. B, 99a-102a.)

The Eleventh Circuit affirmed the district court's opinion, holding:

> "it would be inequitable to allow USX to *present evidence tending to show that it intended to comply with the law*, while allowing [USX] to cloak in privilege those documents tending to show it might have known its actions did not conform to the law." [Emphasis added.]
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> * * *
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> ... USX could have denied criminal intent without affirmatively asserting that it believed that its change in pension fund policy was legal. Having gone beyond mere denial, affirmatively to assert good faith, USX injected the issue of its knowledge of the law into the case and thereby waived the attorney-client privilege. (USX App. A, pp. 66a-68a.)

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

Throughout its Petition, and as the basis for its Question Presented, USX repeatedly misstates the grounds for the Eleventh Circuit's opinion below as being "based *solely* on assertions in legal memoranda that a party believed its actions were legal when taken." (USX Pet., p. 10.) [Emphasis added.]

USX has asserted a "good faith" defense in this action, as grounds for its Motion to Dismiss and in the Pretrial Order, that when "the Company's revised leave of absence policy was adopted and implemented in October 1984 . . . the Company believed the policy to be lawful." (App. A & B, pp. 1a-5a; USX App. A, pp. 65a, 68a.) Moreover, the evidence in this action (self-serving documents created by USX prior to this litigation, testimony of Johnston and Short, and USX's answers to interrogatories) contain repeated statements that USX acted in good faith and acted in reliance on advice of USX counsel, and describe and detail that legal advice favorable to USX's claim of good faith intent to comply with the law. (App. C-L, pp. 6a-31a.) Therefore, USX's statement of the issue and the reasons it advances for the granting of certiorari are erroneous.

Secondly, the decisions of the Third Circuit and of the District of Columbia Circuit cited by petitioner are distinguishable and *do not conflict with the Eleventh Circuit's decision below* or with decisions of other Circuits. The Third Circuit expressly recognizes that in circumstances such as those presented by this case where a client places its legal advice in issue and "attempts to prove a claim or defense by disclosing or describing an attorney-client communication," the client has waived its privilege. *Rhone-Poulenc Rorer, Inc. v. Home Indemnity Co.*, 32 F.3d 851, 863 (3rd Cir. 1994).

Thirdly, USX's petition for certiorari should be denied because the Eleventh Circuit's decision clearly and correctly

applies the facts and circumstances of this particular case to the well-established legal principles concerning a client's implied waiver of the attorney-client privilege. USX, however, contends that the attorney-client privilege should be, at all times, "absolute." (USX Pet., p. 26.)

As has been recognized by Professor Wigmore and by the federal courts repeatedly:

> ". . . the privilege remains an exception to the general duty to disclose. Its benefits are all indirect and speculative; its obstruction is plain and concrete . . . It is worth preserving for the sake of a general policy, but is nonetheless an obstacle to the investigation of the truth. It ought to be strictly confined within the narrowest possible limits, consistent with the logic of its principle." [8 Wigmore, Evidence,] § 2291 at 554.

Garner v. Wolfinbarger, 43 F.2d 1093, 1100 (5th Cir. 1970), 401 U.S. 974 (1971). As this Court held in *United States v. Zolin*, 491 U.S. 554, 562 (1989):

> The attorney-client privilege is not without its costs. Cf. *Trammel v. United States*, 445 U.S. 40, 50, 10 S.Ct. 906, 912, 63 L.Ed.2d 186 (1980). "[S]ince the privilege has the effect of withholding relevant information from the factfinder, it applies only where necessary to achieve its purpose." *Fisher*, 425 U.S. at 403, 96 S.Ct., at 1577.

Accordingly, when a client acts inconsistently with the privilege's purpose "to encourage full and frank communications between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice," *Upjohn Co. v. United States*, 449 U.S. 383, 389, (1981), then the client can be found to have waived the privilege. The Eleventh Circuit's decision properly applied the law.

I.

USX'S PETITION SHOULD BE DENIED BECAUSE IT IS PREMISED ON THE ERRONEOUS ASSERTION THAT THE ELEVENTH CIRCUIT FOUND A WAIVER "FROM NOTHING MORE THAN ARGUMENT OF COUNSEL IN LEGAL MEMORANDA"; IN FACT, USX HAS *REPEATEDLY* ASSERTED A GOOD FAITH DEFENSE AND HAS CREATED AND PRODUCED SELF-SERVING DOCUMENTS IN SUPPORT OF USX'S DEFENSE

In 1986, soon after USX was sued by Union representative Bruce Thrasher, USX began creating evidence designed to help USX show it's "good faith" through exculpatory and self-serving letters and internal memoranda describing USX's legal advice. These documents were produced by USX in this action and state, for example, that USX's "best legal judgment at the time [1984] such policy was adopted indicated that it complied with the law." (App. I, p. 25a.) USX also asserted its "good faith" in its statement of its position in the November 2, 1989 Pretrial Order. USX has gone far beyond merely denying criminal intent.

As the Eleventh Circuit recognized, "'it would be inequitable to allow USX to *present evidence tending to show that it intended to comply with the law*, while allowing [USX] to cloak in privilege those documents tending to show it might have known its actions did not conform to the law.'" [Emphasis added.] (USX App. A, p. 66a.) Use of the privilege for such purposes is contrary to the purpose for which the attorney-client privilege is intended, for use "'as a shield, not a sword.'" *Id.*, quoting *GAB Business Services, Inc. v. Syndicate 627*, 809 F. 2d 755, 762 (11th Cir. 1987). "Since the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose." *Fisher v. United States,*

425 U.S. 391, 402 (1976). Accordingly, the Eleventh Circuit has properly held that USX had waived its attorney-client privilege.

II.

USX'S PETITION SHOULD BE DENIED BECAUSE THERE IS NO CONFLICT BETWEEN THE CIRCUITS AS TO IMPLIED WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE WHEN THE CLIENT ASSERTS AS A DEFENSE THAT IT INTENDED TO ACT IN COMPLIANCE WITH THE LAW

Central to each case applying an implied waiver doctrine is "a simple principle [which] unites the various applications of the implied waiver doctrine":

> Courts need not allow a claim of privilege when the party claiming the privilege seeks to use it in a way that is not consistent with the purpose of the privilege. Thus, since the purpose of the attorney-client privilege is to protect the confidentiality of attorney-client communications in order to foster candor within the attorney-client relationship, voluntary breach of confidence or selective disclosure for tactical purposes waives the privilege. Disclosure is inconsistent with confidentiality, and courts need not permit hide-and-seek manipulation of confidences in order to foster candor.

In re Sealed Case, 676 F.2d 793, 818 (D.C. Cir. 1982).

This consideration underpins the Eleventh Circuit's decision below. USX's proclaimed intent to comply with the law from 1983 to 1988 turns on what USX knew and understood the law to be at that time. Self-exculpatory documents created by USX and voluntarily produced by USX in this action describe in detail legal advice purportedly given USX (deliberately worded so as to support USX's claim that it acted in good faith with the intent

to comply with the law) from 1986 to 1988 and summarize and describe legal advice purportedly given USX by its counsel from 1983 to 1985. Two former USX officials, James Short and J. Bruce Johnston, who, on behalf of USX, spearheaded the grant of extended leaves of absence and payment of pension benefits to the Fairfield Six, the 1984 amendment of USX's Leave of Absence Policy and the 1988 recission of that policy, and payment by the Fund of the pensions into escrow, have testified in this action that they acted in reliance on advice of USX counsel. Another USX official closely involved in these actions was James Carney, one of USX's counsel. In view of these facts (documents and deposition testimony), which will undoubtedly be placed before the jury, and USX's asserted defense in the Pretrial Order below that "at the time the Company's Leave of Absence Policy was adopted and implemented . . . the Company believed the policy to be lawful," the Eleventh Circuit correctly concluded that USX's voluntary production of self-serving documents and USX's assertion that it acted in good faith and attempted to comply with the law were inconsistent with USX's assertion of the privilege and, thus, that USX had waived its privilege. When faced with similar circumstances, other circuits have reached the same conclusion. See *United States v. Bilzerian,* 926 F.2d 1285, 1292 (2d Cir.), *cert. denied,* ___ U.S. ___, 112 S.Ct. 63 (1991); *Chevron Corp. v. Pennzoil Corp.,* 974 F.2d 1156, 1162-63 (9th Cir. 1992). There is no conflict between the Circuits on this issue.

In *Bilzerian,* the defendant, charged with violating securities laws, argued that he had believed his conduct was lawful and sought to testify as to this at trial. On motion *in limine*, the trial court held that such testimony would result in waiver of the privilege, and defendant then chose not to testify as to his belief. On appeal, defendant argued that he had been prevented from refuting the charge of criminal intent, and that he had not intended to disclose the content or existence of any attorney-client communication or to assert reliance on advice of counsel

as a defense. The Second Circuit, while recognizing that "the potential societal benefit may be great in cases like the one at bar, where defendant seeks legal advice in order to act within the confines of highly complex federal securities laws," held that "the attorney-client privilege cannot at once be used as a shield and a sword." 926 F.2d at 1292. The Second Circuit found:

> The waiver principle is applicable here for Bilzerian's testimony that he thought his actions were legal would have put his knowledge of the law and the basis for his understanding of what the law required in issue.

Id.

The Second Circuit held that the district court's ruling:

> . . . did not prevent defendant from denying criminal intent . . . Defendant was free to deny criminal intent either without asserting good faith or to argue his good faith defense by means of defense counsel's opening and closing statements and by his examination of witnesses.

Id. at 1293.

In *Chevron*, Pennzoil took the position that its acquisition of Chevron stock for investment purposes was reasonable based on tax considerations as advised by counsel. The Ninth Circuit held:

> [T]o the extent that Pennzoil claims that its tax position is reasonable because it was based on advice of counsel, Pennzoil puts at issue the tax advice it received. In his declaration, Chairman Lietdke stated that insofar as Pennzoil's decision to proceed with the Chevron investment was based on tax considerations, that decision was made based upon advice of counsel. Pennzoil cannot invoke the attorney-client privilege to deny Chevron access to the very information that Chevron must refute in order to

> demonstrate that Pennzoil's Schedule 13D is materially misleading.

974 F.2d at 1162, 1163.

The decisions relied on by USX in its Petition,[4] in which the courts found no waiver, are distinguishable on their facts. The defenses asserted in *Rhone-Poulenc* and *White* did not necessarily implicate the attorney's advice. Those opinions do not conflict with decisions of other circuits, including the Eleventh, Ninth or Second Circuit decisions.[5]

In *Rhone-Poulenc*, plaintiff, which sold a blood-clotting product (Factorate) for use by hemophiliacs and had been named in a series of AIDS-related lawsuits, sought a declaratory judgment as to insurance coverage for the AIDS-related cases. The insurers argued that plaintiff knew before obtaining insurance coverage that use of Factorate transmitted HIV and, therefore, the claims are excluded from coverage, and asserted the affirma-

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[4] *Rhone-Poulenc Rorer, Inc. V. Home Indemnity Co.*, 32 F.3d 851 (3d Cir. 1994); *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989).

[5] *In Re Burlington Northern, Inc.*, 822 F.2d 518, 533 (5th Cir. 1987) (finding that antitrust defendant's reliance on the *Noerr-Pennington* doctrine was not "a claim or defense that explicitly relies on the existence or absence of the very communications for which he claims a privilege," and, therefore, found no waiver); *Lorenz v. Valley Forge Insurance Co.*, 815 F.2d 1095, 1098 (7th Cir. 1987) (finding, in an action alleging bad-faith failure to pay, that where the insurer offered testimony of its attorney that the insurer had offered to settle the plaintiff's claim after the suit was filed there was no waiver because "Valley Forge did not assert that the offer to settle was made in good faith - it did not have to. Valley Forge sought to show only that post-filing offers had been made."); *Sedco Int'l, S.A. v. Cory*, 683 F.2d 1201, 1204-1207 (8th Cir. 1982), *cert. denied*, 459 U.S.1017 (1982) (in which the Court held that an investor's claim that he had invested in an oil drilling company in reliance on fraudulent misrepresentations of the company's employees was not a waiver of the privilege. The company had argued that the investor's legal advice might be relevant to whether the investor's reliance was reasonable, but the Court held that "we cannot perceive how receipt of ordinary legal advice could have made reliance unreasonable." *Id.* at 1207).

tive defense that plaintiff had intentionally failed to disclose its knowledge of the potential for AIDS-related claims. The Court held:

> It appears that one matter in issue in this case is whether or not the insureds knew, before they obtained coverage, that Armour's pharmaceutical products were causing the transmission of HIV. Rhone-Poulenc has not waived the attorney client privilege by filing this lawsuit or by placing its state of mind in issue. *As Rhone-Poulenc and Armour have not interjected the advice of counsel as an essential element of a claim in this case*, the district court erred in affirming the magistrate judge's decision and in finding they must disclose documents relating to the AIDS-related evaluation that would otherwise be protected from disclosure by the attorney client privilege. [Emphasis added.]

32 F.3d at 864.

The Third Circuit distinguished *Rhone-Poulenc* from cases, such as the cases presented to the Eleventh Circuit below and to the Second and Ninth Circuits, in which "the client has made the decision and taken the affirmative step in the litigation to place the advice of the attorney in issue." *Id.* at 863. In such cases, the Third Circuit held:

> Courts have found that by placing the advice in issue, the client has opened to examination facts relating to that advice. Advice is not in issue merely because it is relevant, and does not necessarily become in issue merely because the attorney's advice might affect the client's state of mind in a relevant manner. *The advice of counsel is placed in issue where the client asserts a claim or defense, and attempts to prove that claim or defense by disclosing or describing an attorney client communication.* [Emphasis added.]

Id.

In *Rhone-Poulenc,* the issue of plaintiff's knowledge was raised by the insurer's defenses, not by the plaintiff-client's request for declaratory judgment, and the insurer sought information showing plaintiff's knowledge that its product transmitted HIV (a technical issue); attorney-client communications, although relevant, were not central to this information. Unlike *Rhone-Poulenc*, in the present case USX (the client) has raised the issue of its knowledge of the law, has created and produced self-exculpatory documents which purport to show that USX has at all times acted on advice of its counsel, and attorney-client communications comprise the basis of USX's knowledge.

In *White,* the defendant (sole shareholder and president of Southern Investment Co. who was convicted of conspiring to defraud the United States under 18 U.S.C. § 371) argued that he believed the "consulting" arrangement between Southern and Finotti, a government agent, was legal because Finotti had reported receiving permission from his superiors. White's belief and intent was not founded on any attorney-client communication. White's primary defense was a general denial of *mens rea.* The Court found that there was no waiver because:

> To be acquitted for lack of criminal intent, White did not need to introduce any evidence of communications to and from [his counsel], and he did not do so.

In the case below, unlike *White,* USX went beyond a mere denial of intent to assert that it believed (based on its advice of counsel) that USX had complied with the law, 29 U.S.C. § 186 and cases interpreting that statute.[6]

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[6] USX's argument that it did not know the law until the March 1986 Third Circuit opinion in *Trailways* is specious and should be firmly rejected by this Court. See, e..g., *Miller v. Amusement Enterprises, Inc.,* 4526 F.2d 534, 536 (5th Cir. 1970):

> The reasoning would essentially transplant the effective date of any statute from the date as fixed by the legislature to the date of the first

(Footnote 6 continued on next page)

USX argues, as additional grounds for granting certiorari, that the Eleventh Circuit's decision creates "uncertainty and unpredictability" as to the application of the implied waiver doctrine and is, therefore, at odds with this Court's decision in *Upjohn Co. v. United States,* 449 U.S. 383 (1981).

As shown above, however, the Eleventh Circuit, in finding a waiver of the privilege, employed legal principles and analysis consistent with *Upjohn* and with *Rhone-Poulenc* and *White.* The Eleventh Circuit's decision, as in *Bilzerian* and *Chevron,* clearly demonstrates that in litigation when a client chooses to assert or raise for its own benefit its good faith intent to comply with the law and produces documents in that action which describe the legal advice given the client, then the client has acted inconsistently with the privilege's purpose and, therefore, waives the privilege. See also *Rhone-Poulenc,* 32 F.3d at 863 (waiver occurs when client places advice in issue and "attempts to prove a claim or defense by *disclosing or describing* an attorney-client

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(Footnote 6 continued)

> authoritative judicial interpretation. It would also mean that the person whose post-effective date (as legislatively fixed) action is the first to be judicially declared in violation of the statute could not be held accountable. . . . Conversely the injured party would have few if any remedies even though expressly provided by the statute in breaking the ground . . . . A fictionalized approach which grants effectual absolution to the first defendant (civil or criminal) and makes a sacrificial lamb of the first victim is hardly acceptable.

Moreover, in *Salvucci v. Gravure Division of Triangle Publications,* 494 F.Supp. 126 (E.D. Pa. 1980), *aff'd,* 649 F.2d 860 (3d Cir. 1981), the district court held that an oral agreement by an employer and union representative pursuant to which the union representative would be granted an extended leave of absence and paid severance benefits would violate 29 U.S.C. § 186. See also *Haley v. Palatnik,* 509 F.2d 1038, 1042 (2nd Cir. 1975). Furthermore, the district court's opinion in *Trailways,* holding that the employer's contributions of pensions for union representatives was illegal, was decided in February 1985.

communication"). In addition, the Eleventh Circuit and other courts have recognized the inherent prejudice which occurs when a client asserts its belief that its actions were in compliance with the law and produces or describes advice in support of those actions, yet seeks to preclude the other litigant from discovering evidence to rebut and challenge that defense. (USX App. A, p. 66a.) See also, e.g., *Chevron*, 974 F.2d at 1163; *Conkling v. Turner*, 883 F.2d 431, 434 (5th Cir. 1989), in which the Court found a limited waiver of the privilege where plaintiff claimed to have had no knowledge of the basis of his RICO claim until after being informed by his attorney, and recognized:

> The great weight of authority holds that the attorney-client privilege is waived when a litigant "place[s] information protected by it in issue through some affirmative act for his own benefit, and *to allow the privilege to protect against disclosure of such information would be manifestly unfair to the opposing party.*" [Emphasis added.]

Recent district court decisions demonstrate that the courts have uniformly applied this rule, balancing the interest of the client in preserving the privilege, the public's interests and the litigants interest in discovery of relevant evidence. See, e.g., *In re ML-Lee Acquisition Fund II, L.P.*, 859 F. Supp. 765 (D. Del. 1994) in which defendants charged with violations of the Investment Company Act of 1940, took the position that they believed their actions were lawful and "raised the 'act' of consulting counsel" as evidence of their good faith but denied reliance on advice of counsel. *Id.* at 767. The Court held:

> Even if the Lee Defendants intend only to rely on the act of seeking advice from counsel to show they behaved in good faith, Plaintiffs are entitled to test the validity and sincerity of that action. In order for Plaintiffs to have a fair and adequate opportunity to test and rebut Defendants' allegations that they sought advice from counsel, Plaintiffs are

> entitled to know, for example, whether the Lee Defendants disclosed all material facts to counsel, whether counsel gave an otherwise well-informed opinion, and did the Lee Defendants follow the advice from counsel.

The Eleventh Circuit did not affirm the district court's finding of waiver simply because the communications were relevant. As Rule 26(b), Fed. R. Civ. P., contemplates privileged information is very often relevant to issues in an action. The Eleventh Circuit held that by "affirmatively assert[ing] good faith, USX injected the issue of its . . . knowledge of the law into the case and thereby waived the attorney-client privilege." (USX App. A, p. 68A.)

The Eleventh Circuit's decision, finding that under the particular circumstances of this case USX has waived the attorney-client privilege as to certain communications with counsel, fairly balances the interest expressed in *Upjohn*, to encourage full and frank communication with counsel without fear of later unexpected compelled disclosure, 449 U.S. at 389, and the interest expressed in *Fisher*, that the attorney-client privilege which has the effect of withholding relevant information should apply "only where necessary to achieve its purpose." 425 U.S. at 402.

CONCLUSION

This Court should deny USX's Petition for Writ of Certiorari.

Respectfully submitted,

J. Vernon Patrick, Jr.*
Alexander S. Lacy
William M. Acker, III
Elizabeth N. Pitman
Patrick & Lacy, P.C.
1201 Financial Center
Birmingham, Alabama 35203
(205) 323-5665

Samuel Maples
2001 Park Place
Suite 1010
Birmingham, Alabama 35203

Michael H. Bite, Jr.
1245 Park Place Tower
2001 Park Place North
Birmingham, Alabama 35203

*Counsel of Record

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a U.S. STEEL CORPORATION,
a Delaware corporation, et al.,
Defendants.

PRE-TRIAL ORDER

[Filed November 1, 1989]

A pre-trial conference was held in the above case on October 30, 1989, wherein, or as a result of which, the following proceedings were held and action taken:

1. *Appearances.* Appearing at the conference were:

(a) *For Plaintiffs*:

J. Vernon Patrick, Jr.
Alex S. Lacy
William M. Acker, III
Elizabeth N. Pitman
Samuel Maples
Michael H. Bite, Jr.

(b) *For Defendants Company and Fund*:

Michael L. Lucas
Leonard A. Scheinholtz

(c) *For Defendant Union*:

Joe R. Whatley, Jr.
Jerome A. Cooper
Carl B. Frankel

TRIAL DATE: July 9, 1990

* * *

(c) *Defendants' position*:

(1) Company and Fund. * * *

At the time the Company's revised leave-of-absence policy was adopted and implemented in October, 1984, almost one year after the Fairfield Agreement was signed, the Company believed the policy to be lawful. The Company believed the policy to be lawful since it was merely an extension, with certain modifications, of its two-year leave-of-absence policy for Union officials contained in § 13-J of the Basic Labor Agreement between the Company and the Union which had been in effect for a number of years, and which the Union had sought to extend beyond the two-year period for over ten years. When the revised policy was implemented, there were no court decisions declaring such policies unlawful.

The Company, as the plaintiffs' amended complaint itself clearly shows, rescinded the policy in 1987 because of the intervening court decisions of the Second and Third Circuits in *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986), and *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 479 U.S. 932 (1986). The Company's principal place of business, Pittsburgh, Pennsylvania, is in the Third Circuit. The Company and the Fund do not understand how the plaintiffs can criticize the Company for rescinding the policy in order to conform to court decisions issued after adoption of the revised leave policy and to protect

itself against possible criminal charges under § 302 of the LMRA, 29 U.S.C. § 186(d)(2).

* * *

ORDERED this the 1st day of Nov., 1989, that the above provisions be binding on all parties unless modified by further order for good cause shown.

/s/ J. Foy Guin, Jr.
United States District Judge
J. Foy Guin, Jr.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, et al.,

MEMORANDUM OF USX CORPORATION AND UNITED STATES STEEL AND CARNEGIE PENSION FUND IN SUPPORT OF THEIR MOTION TO DISMISS

S. G. Clark
Billy M. Tennant
USX CORPORATION
600 Grant Street
Pittsburgh, Pennsylvania
15230
(412) 433-2977

F. A. Flowers, III
Michael L. Lucas
BURR & FORMAN
3000 SouthTGrust Tower
Birmingham, Alabama 35203
(205) 251-3000

Attorneys for Defendants, USX Corporation
and United States Steel and Carnegie Pension Fund

* * *

At the time the revised leave-of absence policy was implemented in October, 1984, almost one year *after* the Fairfield Agreement was signed, USX believed the policy to be lawful since it was merely an extension, with certain modifications, of its two-year leave-of absence policy which had been in effect for a number of years, and which had been the subject of a dispute

between the Company and the Union for over ten years. When the revised policy was implemented, there were no court decisions declaring such policies unlawful.

The Company, as the complaint itself clearly shows, rescinded the policy in 1987 because of the intervening decisions of the Second and Third Circuits in *BASF Wyandotte Corp. v. Local 227*, 791 F.2d 1046 (2d Cir. 1986); and *Trailways Lines, Inc. v. Trailways, Inc. Joint Council*, 785 F.2d 101 (3d Cir.), *cert. denied*, 107 S.Ct. 403 (1986). (Complaint Ex. #D). The Company notified the Union accordingly. (Complaint Ex. #C). Of course, the Company's principal place of business, Pittsburgh, Pennsylvania, is in the Third Circuit.

* * *

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

UNITED STEELWORKERS OFAMERICA,
AFL-CIO-CLC,et al.,
Defendants.

RESPONSE OF DEFENDANTS USX CORPORATION AND THE UNITED STATES STEEL AND CARNEGIE PENSION FUND TO PLAINTIFFS' FIRST REQUEST FOR ADMISSIONS:

Comes now Defendants USX Corporation (the "Company") and the United States Steel and Carnegie Pension Fund (the "Fund") and for their responses to each numbered paragraph of Plaintiffs' First Request for Admissions say as follows:

* * *

51. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

52. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

53. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

54. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

55. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

56. Denied. Deposits are being made into an escrow account by the Fund pursuant to the Fund's own decision based on the advice of counsel.

* * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

CIVIL ACTION NO. CV-88-G-2069S

LESLIE RAY COX, et al.,
Plaintiffs,

vs.

USX CORPORATION, a/k/a U.S. STEEL CORPORATION,
A Delaware corporation, et al.,
Defendants.

DEFENDANT USX CORPORATION'S ANSWERS TO PLAINTIFFS' FIRST SET OF INTERROGATORIES

Defendant USX Corporation ("USX" or "the Company") hereby responds to Plaintiffs' First Set of Interrogatories as follows:

* * *

18. Please identify each officer of the "Company" who drafted or approved Exhibit "A" prior to the October 22, 1984 meeting of the Corporate Policy Committee of the "Company".

ANSWER TO INTERROGATORY NO. 18

James D. Short, T. W. Sterling, J. Bruce Johnston.

19. Identify each individual employed by the "Company" who supervised the drafting of Exhibit "A" prior to the October 22, 1984 meeting of the "Company's" Corporate Policy Committee.

ANSWER TO INTERROGATORY NO. 19

In addition to those individuals identified in the response to Interrogatory No. 18, James T. Carney and C.E. Magistri, Assistant to the Vice-President, Benefits Administration.

* * *

44. Please identify the individual or individuals who determined or drafted the criteria (if any) and the eligibility requirements to be applied by the "Company" in determining which applications for a Leave of Absence greater than two years would be approved and which would not be approved by the "Company" or by the "Fund".

ANSWER TO INTERROGATORY NO. 44

J. Bruce Johnston, James T. Carney

* * *

61. Please state whether an escrow account has been established for receiving and holding in escrow any pension payments which were awarded to any of the six "Union" officials referred to in Exhibit "B" (E. B. Rich, Thermon Phillips, Ralph Gurley, et al.) who received a Leave of Absence (pursuant to the "Company's" revised policy (described in Exhibits "A" and "B") from the "Company". If so, please identify (a) each of the reasons why the escrow account was created; (b) the date on which an escrow account was established to receive such pension payments to the six "Union" officials (E. B. Rich, Thermon Phillips, Ralph Gurley, et al.) who received a long-term Leave of Absence from the "Company"; (c) the parties to such escrow agreement; (d) the person(s) or entity holding the money in escrow; and (e) state whether each of the six "Union" officials or representatives is still receiving life insurance coverage or health insurance coverage paid by the "Fund" or the "Company".

ANSWER TO INTERROGATORY NO. 61

Pensions are currently being paid into escrow at Mellon Bank in the case of the six Union officials.

a. Advice of counsel.

b. See pension files of the six Union officials from Fairfield produced in response to Request for Production of Documents.

c. See the above response.

d. Mellon Bank.

e. No.

* * *

63. State whether any of the six "Union" officials referred to in Exhibit "B" are presently receiving any pension benefits from the "Fund" or from the "Company".

A. If not, state whether any pension benefits for any of the six "Union" representatives are presently being paid into escrow or held in escrow.

B. If such benefits are being held or paid into escrow, identify why and when the "Company" first discontinued making payments directly to the recipient of the benefits and instead began paying, or holding, such pension benefits in an escrow account.

C. Identify each "Company" or "Fund" officer or employee involved in the decision to discontinue making pension payments direct to one or more of the six "Union" representatives referred to in Exhibit "B," or involved in the decision and in any arrangements made with respect to paying into escrow or holding in escrow payments for pension benefits for the six "Union" officials referred to in Exhibit "B."

ANSWER TO INTERROGATORY NO. 63

63. No.

A. Yes

B. Yes, see pension files produced in response to Request for Production of Documents. Amounts paid into escrow on advice of counsel.

C. J. D. Short, James T. Carney, J. Bruce Johnston.

* * *

75. In the last paragraph of Exhibit "C," the following statement was made:

> Accordingly we have rescinded such amendments to our leaves-of-absence policy to assure compliance with the law. Consistent with that change we are denying several recent requests for such leaves-of-absence (apparently based on the earlier amendment) from the employees of the International Union. We are not rescinding the leaves-of-absence which previously had been granted pursuant to such policy.

A. Please identify each "Union" employee or official referred to in Mr. Johnston's letter (Exhibit "C"), who had previously been granted a Leave of Absence by the "Company" pursuant to the revised policy adopted on October 22, 1984, but whose Leave of Absence was not rescinded by the "Company" prior to Johnston's April 28, 1987 letter to Lynn R. Williams (Exhibit "C").

B. Please identify each of the reasons why the "Company" did not rescind the Leave of Absence previously granted certain "Union" officers or employees (Thermon Phillips, E. B. Rich, Carl Statum, Ralph Gurley, Virgil Pierson and Fred Shepherd).

ANSWER TO INTERROGATORY NO. 75

A. The six Union officials who had previously been given leaves of absence.

B. USX did not believe it had the authority under ERISA to take away pensions once granted and for this reason did not believe it could take away leaves of absence which formed the basis for the grant of such pensions.

* * *

APPENDIX E

PLAINTIFF'S EXHIBIT #111

UNITED STATES STEEL
CORPORATION
Interorganization Correspondence
Date: August 27,. 1984
From: James T. Carney
General Attorney

To: J. D. Short
Vice President
Administration

Subject: *Pension Request of the International Union*

Following up on our conversations concerning the above matter, it is my understanding that it seems preferable from an employee relations standpoint to grant the above request from the International Union on a unilateral basis as opposed, for example, to entering into a specific letter agreement granting such request. Accordingly, it is your thought that a proposal be made to CPC to approve leave of absences on the basis discussed with the International Union and that such proposal be implemented unilaterally upon CPC approval. Accordingly, by carbon copy of this memorandum, I am asking J. C. James to disregard my memorandum of August 24, 1984 regarding the above and to modify Paragraph B-2-d of PER 223-51 as follows: "except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time." Attached hereto is a draft of language to be used in the context of a CPC resolution regarding the above.

/s/James T. Carney

sms
Attachment

cc: T. W. Sterling
w/attachment

D. B. King
w/attachment

J. G. James

DRAFT
8/27/84

Effective September 1, 1984 for the purpose of determining eligibility for and the amount of benefits under Sections 2.1, 2.2, 2.4, 2.5, 2.6(a)(4) and 2.7(a)(5)(iii) of the 1980 Non-Contributory Pension Rules and any successor thereto, any employee from production and maintenance or clerical and technical bargaining units represented by the United Steelworkers of America at United States Steel Corporation's current steel producing operations (e.g., Fairless, Mon-Valley, Lorain, Gary, Geneva, Texas and Fairfield) who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union and (c) shall continuously have held positions servicing bargaining units at the U. S. Steel division in which he had been employed shall be granted a leave of absence in between the date on which such employee left active employment with U. S. Steel Corporation and the earlier of (a) the date of retirement from United States Steel Corporation or (b) the date employment with the International Union terminates. Notwithstanding anything to the contrary contained herein, no such employee shall receive any benefit under the Non-Contributory Pension Rules except insofar as he satisfies all eligibility criteria for the retirement in question and any pension payable such an employee shall be calculated under the minimum formula.

* * *

APPENDIX F

PLAINTIFF'S EXHIBIT #75

UNITED STATES STEEL CORPORATION
CORPORATE POLICY COMMITTEE
Meeting of October 22, 1984
Pittsburgh, Pennsylvania

A meeting of the Corporate Policy Committee of United States Steel Corporation was held at 600 Grant Street, Pittsburgh, Pennsylvania, on Monday, October 22, 1984, at 9:15 A.M.

There were present:

D. M. Roderick
T. C. Graham
R. M. Hays
H. D. Hoopman
J. B. Johnston
T. Marshall
W. E. Swales
W. B. Thomas

being a quorum.

The Chairman, D. M. Roderick, presided. R. M. Hays was Secretary.

Revision to PER 223-51

On motion, duly made, seconded and unanimously carried, the following resolution was adopted:

RESOLVED: That revision of PER 223-51, Leaves of Absence, in the Administration Manual - Personnel, as set forth in statement submitted to this meeting, be, and the same hereby is, authorized as amended at the meeting.

Adjournment — On motion, duly made, seconded and unanimously carried, the meeting adjourned.

/s/ R. M. Hays
Secretary

FOR CONSIDERATION OF THE
CORPORATE POLICY COMMITTEE

October 22, 1984

Company: United States Steel Corporation

Subject: Revision of PER 223-51, Leaves of Absence

Scope: Former Employees of United States Steel Corporation who are current employees of the United Steelworkers of America International Union as defined in the Proposal

Basis for Proposal: Under the Leave of Absence Policy, bargaining unit employees who accept full time employment with the union are limited to a one-year leave of absence which may be extended for one additional year before service breaks. Consequently, many of these former employees never attain eligibility for a USS pension. Labor Relations is of the opinion that it is in the Company interest that United Steelworkers of America International Union (USW) representatives with whom they deal be familiar with the United States Steel facilities they represent. It is felt that there is a distinct advantage to be dealing with International representatives who were formerly employed by United States Steel concerning potential problems and/or grievances and implementation of the various collective bargaining agree-

ments. Thus, it is in the Company's interest to foster and promote the goodwill of former employees who were granted leaves of absence to work for the USW.

Therefore, it is proposed that the Leave of Absence Policy be revised to permit granting leaves of absence beyond two years with the concurrence of the Corporate Policy Committee.

Proposal: Effective February 29, 1984

(a) Amend paragraph B.2.d of PER 223-51 by replacing the second sentence of such paragraph with the following sentence (underscoring denotes the change):

"Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the Company, *except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time.*"

(b) Grant leaves of absence to former employees who meet the conditions specified below:

A leave of absence shall be granted for the period between the date on which the employee left active employment with United States Steel Corporation and the earlier of (i) the date of retirement from United States Steel Corporation, or (ii) the date employment with the United Steelworkers of America International

Union terminates, with the proviso that such leave of absence which is creditable as continuous service shall be used for the purpose of determining eligibility for any type of pension under the 1980 Non-Contributory Pension Rules and any successor thereto other than a 30 year, 60/15 or deferred vested pension and to determine the amount of pension under said rules, except that the pension provided with respect to such service shall be determined solely on the minimum formula of the rules; and further, that such leave of absence shall be granted only to employees of United States Steel Corporation's current steel producing operations (e.g., Fairless, Mon-Valley, Lorain, Gary, Geneva, Texas and Fairfield) who (a) prior to January 1, 1978 left active employment with United States Steel Corporation in order to accept or continue employment with the International Union, (b) from the time of cessation of active employment until February 29, 1984 shall have continued in the active employment of the International Union and (c) shall continuously have held positions servicing bargaining units at the U. S. Steel division in which he had been employed.

Recommendation: That the foregoing proposals be adopted by the Corporate Policy Committee.

Submitted by /s/ J. Bruce Johnston
J. Bruce Johnston
Executive Vice President
Employee Relations

APPENDIX G

PLAINTIFF'S EXHIBIT #96

Mr. Lynn R. Williams, President
United Steelworkers of America
Five Gateway Center
Pittsburgh, PA 15222

April 28, 1987

Dear Mr. Williams

As you may recall, on March 5, 1985, I wrote you to advise that the then United States Steel Corporation had amended its leave-of-absence policy in order to permit the award of retroactive leaves of absence to designated union officials who had left its employ prior to January 1, 1978 to accept positions with the International Union. Eligibility for such leaves of absence was limited to employees who had previously worked in USX's then existing steel producing operations and who had continuously serviced the USX division which they had left. Moreover such leaves of absence would permit employees to receive pension credit for certain types of pension only. This amendment had been adopted in response to complaints by International Union officials that USX had been much more restrictive in its grants of leaves of absence to long term Union officials than had the other employers in the steel industry.

Although at the time, we believed that granting of such leaves of absence was fully permissible under law, we have now concluded in view of recent Decisions by the Second Circuit Court of Appeals in *BASF Wyandotte Corporation v. Local 227 International Chemical Worker's Union and AFL-CIO, et. al.*, 791 F.2d 1046 (2d Cir. 1986) and most particularly, by the Third Circuit Court of Appeals in *Trailways Lines v. The Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC*, 785 F.2d 101 (3rd Cir. 1986, cert. den. 1986) that granting

such leaves of absence (or accepting such leaves of absence) violates the prohibitions of Section 302 of the Labor Management Relations Act.

Accordingly, we have rescinded such amendments to our leaves-of-absence policy to assure compliance with the law. Consistent with that change, we are denying several recent requests for such leaves of absence (apparently based on the earlier amendment) from employees of the International Union. We are not rescinding the leaves of absence which previously had been granted pursuant to such policy.

Yours very truly,

/s/ J. Bruce Johnston

J. Bruce Johnston

APPENDIX H

PLAINTIFF'S EXHIBIT #79

FOR CONSIDERATION OF THE
CORPORATE POLICY COMMITTEE May 14, 1987

Company:	USS, Division of USX Corporation
Subject:	Revision of PER 223-51
Scope:	Former Employees of USS Division who are currently employees of the United Steelworkers of America
Basis for Proposal	On October 22, 1984, the Corporate Policy Committee approved an amendment to PER 223-51 which permitted the granting of leaves of absence for more than a two year period to certain former USS Division employees who left the Company to work for the United Steelworkers of America International Union (USW). The eligibility criteria for such long term leaves of absence were spelled out in the proposal adopted by the Corporate Policy Committee on October 22, 1984. Pursuant to such policy, leaves of absence have been granted to seven former employees. At present, there are pending applications for leaves of absence by another seven former employees who may or may not otherwise satisfy the conditions for such leaves. However, in view of recent decisions of the Third *Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC,* 785 F.2d 101 (3rd Cir. Court of Appeals in *BASF Wyandotte Corporation v. Local 227 International Chemical Workers's Union and AFL-CIO, et al.,* 791

F.2d 1046 (2d Cir. 1986), it is now clear that granting long term leaves of absence to employees who have left the employ of the Company to take positions with the USW violates the Labor Management Relations Act.

Therefore, it is proposed that the Leave of Absence Policy be revised to prohibit granting leaves of absence beyond two years.

Proposal: Effective April 1, 1987

(a) Amend Paragraph B-2-d of PER 223-51 by deleting the underscored material in the second sentence of this paragraph:

"Such leaves of absence shall not break continuous service and shall be for not more than one year and may be renewed for a further period of one year at the discretion of the Company, *except as the Corporate Policy Committee approves the granting of a leave of absence for a longer period of time.*"

(b) Rescind the grant of authority contained in the Corporate Policy Committee Resolution of October 22, 1984 which permitted the Executive Vice President-Employee Relations to approve applications for extended leaves of absence by former employees who met the conditions specified in such resolution.

Recommendation: Proposal adoption by the Corporate Policy Committee. The Law Department concurs in this recommendation.

Submitted by /s/ J. Bruce Johnston
J. Bruce Johnston
Executive Vice President
Employee Relations

APPENDIX I

PLAINTIFF'S EXHIBIT #88

USX CORPORATION
EXECUTIVE VICE PRESIDENT
EMPLOYEE RELATIONS
April 16, 1987

J. Bruce Johnston:

Re: *Long-Term Leaves of Absence for Union Personnel*

This is to follow up on our several discussions on the above subject. Attached for your information is a copy of a memorandum prepared by Paul A. Robb of this department concerning the impact of *BASF Wyandotte Corporation v. Local 227 International Chemical Worker's Union and AFL-CIO, et al.*, 791 F.2d 1046 (2d Cir. 1986) and *Trailways Lines v. The Trailways, Inc. Joint Council of the Amalgamated Transit Union, AFL-CIO, CLC*, 785 F.2d 101 (3rd Circuit 1986, *cert. denied* (1986) on a proposal advanced by the Union in the summer of 1986 which proposal called for USX to grant retroactively leaves of absence for up to 10 years to employees who left USX's employ to take positions with the Union. In this memorandum, Mr. Robb concluded that such proposal violated Section 302 of the LMRA since it involved giving a thing of value (pension credit) to Union officials who by definition would not be rendering any service to the employer in the short term. Mr. Robb concluded that such action would be indistinguishable from the action of contributing to a multi-employer pension fund on behalf of employees who had taken long term leaves of absence to accept union positions — an action which the Third Circuit held illegal in *Trailways.*

Although his memorandum was directed at the specific proposal orally made by the USW in the summer of 1986 and withdrawn by the USW when we requested that the proposal be

applicable to our current policy (established in 1984) of granting, subject to the approval of CPC, long-term leaves of absence to employees who had left USX's service in the past to take employment with the Union and who had been denied renewal of leaves of absence after the initial one year leave of absence and the standard renewal of the same. Although our best legal judgment at the time such policy was adopted indicated that it complied with the law, it is the opinion of this department that such a position is no longer tenable in view of *Trailways* and *BASF Wyandotte.*

Accordingly, it is our recommendation that such policy be abolished immediately. To accomplish this, we suggest that CPC rescind the policy adopted in 1984, that PER 223-51, Section B-2-d be revised to its pre-1984 state which limited leaves of absence to one for one year with a renewal for a second year, and that the International Union be advised that in view of the *Trailways* decision, we believe it is illegal to grant leaves of absence for longer than two years. Accordingly, the requests for leaves of absence on a retroactive basis made by Messrs. Toth, et al. should be denied on this basis.

/s/ James T. Carney
James T. Carney

Attachment

cc: T. W. Sterling
J. D. Short
D. B. King
W. R. Hawkins
S. G. Clark

APPENDIX J

PLAINTIFF'S EXHIBIT #109

September 14, 1987

J. Bruce Johnston:

Re: *Union Leaves of Absence Communications Workers of America, AFL-CIO vs. Bell Atlantic Network Services Inc., et al.*

I have read the District Court's opinion in the above case. I should note that superficially the facts in this case seem to be closer to the USX situation than those in the *Trailways* case because both this case and our situation involve single employer plans in which the Union normally does not have any role in plan administration. *Trailways*, on the other hand, involved a multi-employer plan. Despite this similarity between our situation and *Bell Atlantic* and the dissimilarity between our situation and *Trailways*, I believe our situation to be closer to the *Trailways* situation than to the *Bell Atlantic* situation because our situation resembles *Trailways* with respect to several factors which the court in *Bell Atlantic* found to be significant in distinguishing *Bell Atlantic* from *Trailways*.

1. The leaves of absence in *Bell Atlantic* involved some element of company discretion. Leaves of absence are non-discretionary in our case and in *Trailways*.

2. The leaves of absence in *Bell Atlantic* could not exceed a maximum of 18 years and averaged about 4.8 years. In our case, as in *Trailways*, the leaves of absence are unlimited and, in the case of the Fairfield group, exceed 15 years in most instances.

3. The collective bargaining agreement providing for leaves of absence in *Bell Atlantic* was ratified by the members. In our cases, the agreement was never ratified by the members and was apparently kept secret from many Union officials.

4. The collective bargaining agreement provisions relative to the leaves of absence in *Bell Atlantic* go back to the late 1940's whereas ours originated in 1984.

5. Pension benefits in *Bell Atlantic* were based on last employment with the employer. In our situation, pension benefits are based on upgrading of the minimum formula. In *Trailways*, pension benefits are based on the upgrading of salary.

Although I note these significant differences in the facts of *Bell Atlantic* and the facts of *Trailways*, we should recognize that these differences may not have led Judge Gasch (the judge in the *Bell Atlantic* case) to a different result since Judge Gasch (a Johnson appointee) in *Bell Atlantic* set forth his view that Trailways was wrongly decided.

Given the fact that *Bell Atlantic* is only a district court decision and the *Trailways* decision is from the Third Circuit which is the most likely circuit in which action will be brought against USX concerning this matter, and given the fact that we have obtained CPC approval for our current position, it is my recommendation that we continue to take the position that the former policy violates the law and that we cannot and will not reinstitute the same without a specific order of court. If you concur in the above, I suggest that we communicate the same to Mr. Toth and company by letter. I believe that to have a further meeting to announce USX's decision would be counterproductive and probably aggravate hard feelings.

/s/ James T. Carney
James T. Carney

pfc
cc: James D. Short

APPENDIX K

PLAINTIFF'S EXHIBIT #21

UNION MEETING MINUTES

Leaves of Absence

September 3, 1987 - 10:15 a.m.

USW: Toth, Foley & Eckman

USX: Johnston, Short & Carney

Toth says he has received Short's letter denying his claim. He says the Union has difficulty understanding how the company can change or rescind the policy retroactively in the sense that the Toth application and others had been filed. Two groups: (1) those who had vested USX pensions (Toth and Foley); (2) those who did not have vested USX pensions. Toth says that when policy was adopted, both groups should have been given pension continuous severance. Toth says he and Foley have worked continuously servicing USX units. Toth asks for copy of initial letter to Williams. Johnston indicates that Toth should get initial letter from Williams. Toth says he would do so. Toth claims that Trailways case relied upon by USX involves multi-employer plan. Toth points out that USW had made demand in this area in negotiations unaware that USS already had taken some action in this area. Short points out that he requested a written demand from the Union and Toth had dropped the matter at that point.

Johnston reviews history of USX policy on leaves of absence for Union officials. He states that he had discussed matters with Abel, McBride and Odercich but not with Williams. Toth suggests Johnston/Williams do not get along. Johnston says no personal antagonism; significant conflict with Williams because of institutional differences. USX strictly limited leaves of absence. Abel and McBride agreed. Bredhoff raised problem of Union officials not getting deferred vested pensions even though

they would have been eligible under the 1975 pension agreement liberalized vesting standards.

Fairfield became major problem with restrictive work practices. Local negotiations approved by McBride. Miller heads up for USX. Williams called Johnston on Ambridge in December 1983. Johnston says Union must remove veto on local deal at Fairfield if he is to extend pension agreement at Ambridge. Rich says if Union is to liberalize work practices at Fairfield, USX should liberalize leave of absence policy. USX representatives outline willingness to make recommendations for policy liberalizations. Policy Committee adopts the revised policy; Johnston notifies the Union. Law changes with Trailways decision. Carney calls this to attention of Johnston and Policy Committee changes policy; not retroactively.

Toth recites history of Bell Atlantic case. He agrees to supply USX with copy of the decision. Johnston says he will examine. Toth asks about Thrasher settlement. Johnston says he did not approve Thrasher deal. Johnston says policy was clearly intended to apply across the board. Toth asks why plan participants not advised. Carney says no change to plan itself so no need to notify participants. Johnston points out that he sent letter to Williams as head of the Union but received no response. Toth indicates that he thought there had been a response. Johnston gives Toth a copy of the CPC resolution in question.

* * *

APPENDIX L

PLAINTIFF'S EXHIBIT #108

United States Steel and
Carnegie Pension Fund

(A Pennsylvania Corporation)

600 Grant Street
Pitsburgh, Pennsylvania 15230

J.D. Short
Vice President — Administration

May 26, 1988

Mr. Thermon Phillips
1240 Southwind Drive
Helena, AL 35080

Dear Mr. Phillips:

I write you in connection with your receipt of a USX 70/80 retirement under Mutually Satisfactory Conditions. As you will recall, you are receiving that pension because you were granted a leave of absence, retroactive to the date of your termination with United States Steel Corporation (now USX). This retroactive leave of absence was the result of the adoption by USX of a policy of granting such leaves of absence under carefully defined circumstances. This policy authorized the removal of the break in your pension continuous service, which occurred in 1953. That removal resulted in your being granted pension continuous service credit, retroactively, for the intervening period.

Since that time, three Decisions by the United States Court of Appeal (for the Second, Third and Fifth Circuits, respectively) have raised serious challenges concerning the legality of approving special, retroactive leaves of absence which enable union

officials to receive credit for pension purposes for extended periods which they spend in the service of the Union. Recently, two lawsuits have been filed by former and present Union officials -- one in Alabama by Messrs. Summerville and Elliott and the other in Illinois by Messrs. Sadlowski, Toth, Foley, et al., seeking to require USX Corporation to expand its granting of retroactive pension continuous service credit to cover the named plaintiffs for extended periods of time in which they were in the employ of the Union.

While it was the preference of USX and of the United States Steel and Carnegie Pension Fund, which is also a defendant in these actions, to await ruling from the courts concerning the appropriate action to be taken with respect to these requests for leaves of absence as well as past grants of leaves of absence, we now have been advised by outside counsel that continued payment of pension to you, in light of the current legal developments, could possibly subject both you and the defendants in these actions to criminal liability. In view of the above, we have determined that the only prudent course of action for us to take is to suspend your pension immediately, and to pay such pension into an interest bearing escrow account pending a final, definitive judicial resolution of the litigation in question and, if necessary, appropriate court rulings with respect to the leave of absence granted you (of course, while your pension is in suspension, you will not be covered by USX's retiree life and medical insurance).

I am sure that you will understand the reasons for our decision with respect to this matter.

Yours very truly,

/s/ J.D. Short
Vice President-Administration

SUPREME COURT, U.S.
FILED
DEC 9 1994
OFFICE OF THE CLERK

No. 94-721

In The Supreme Court of the United States

October Term, 1994

USX CORPORATION,

Petitioner,

v.

LESLIE RAY COX, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

REPLY BRIEF FOR PETITIONER USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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DISCLOSURE STATEMENT PURSUANT TO RULE 29.1

Petitioner USX Corporation ("USX") herein incorporates the disclosure statement set forth in its petition for writ of certiorari.

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REPLY BRIEF FOR PETITIONER USX CORPORATION IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

ARGUMENT

Respondents' Brief in Opposition ("*Opp.*") appears calculated to convince the Court that a waiver of the attorney-client privilege is necessary in this case to avoid unfairness to Respondents. Respondents, however, were not content to construct their unfairness argument on the existing record, or on the actual holding of the Eleventh Circuit, since their Opposition grossly misstates both in material respects.[1]

Respondents' strategy is capsulized in their reformulation of the question presented in this proceeding. That reformulation contains not just one, but multiple diversionary misstatements. First, it makes reference to USX's alleged creation of "self-serving documents". In fact, neither the district court, nor the Eleventh Circuit, found any document to be "self-serving". The district court specifically rejected this contention, stating: "Although plaintiffs claim the disclosures are 'self-serving', the court does not find them so." USX App. B at 101a. The Eleventh Circuit did not disturb this finding. USX App. A at 65a-69a. More importantly, contrary to Respondents' blatant misstatement of the holding of the Eleventh Circuit, *Opp.* at 14, 19, alleged self-serving documents played no role whatsoever in the Eleventh Circuit's holding.

Next, Respondents' reformulation of the question presented states that the alleged self-serving documents were contrived as they were created "with a view" to later establishing USX's

---

[1]Additionally, Respondents' Opposition contains numerous misstatements regarding underlying facts. For the most part, those misstatements are immaterial to the question presented for review, and, where so, will be ignored here.

intent to comply with the law. There exists not one shred of evidentiary support for such a statement and, of course, Respondents provide no record citation for this claim. Moreover, again, this notion of contrived, cover-up documents played no role at all in the holding of either the district court or circuit court.

Respondents' question reformulation proceeds to refer to USX's "voluntarily" producing "those self-serving exculpatory documents". In reality, however, aside from a few privileged documents inadvertently produced by USX—and regarding which (like all other attorney-client communications) USX has stated unequivocally that it will not rely on at trial—there was nothing at all voluntary about the production of these documents. All the discovery responses now complained of by Respondents — whether they be answers to deposition questions, answers to interrogatories, document production or responses to requests for admissions—were responses to specific inquiries of the Respondents. USX was obligated to provide the information requested in accordance with the Federal Rules of Civil Procedure.

Finally, Respondents' reformulation of the question presented suggests that the waiver finding here was necessary so that Respondents can "rebut and challenge defendants' good faith defense." As a matter of fact, however, USX has never asserted any defense of "good faith" in this case, and USX expressly has disclaimed any reliance upon any attorney-client communication in its defense.

Despite Respondents' efforts at mischaracterization, there is no issue of unfairness presented here to begin with, beyond that which is inherent in the protections afforded by the attorney-client privilege. The legality of the "state of mind" waiver doctrine adopted by the Eleventh Circuit is what is at issue here. Respondents' attempts to ignore, or factually distinguish, the conflicting circuit court opinions on this fundamental issue of privilege are unpersuasive.

I. Respondents Mischaracterize the Record and Misstate the Eleventh Circuit's Holding.

Respondents begin with the argument that the petition should be denied because "it is premised on the erroneous assertion that the Eleventh Circuit found a waiver 'from nothing more than argument of counsel in legal memoranda.' " *Opp.* at 12. In fact, the Eleventh Circuit **did** find a waiver on the basis of argument of counsel in legal memoranda and nothing more. *See* USX App. A at 65a-66a. More specifically, the Eleventh Circuit cited two such memoranda, and nothing else. The Court's decision on this point is unambiguous, and Respondents' attempt to recast the Eleventh Circuit's rationale is entirely unsupported by a straightforward reading of the decision.

Respondents next maintain that the petition should be denied because "USX has repeatedly asserted a good faith defense." *Opp.* at 12 (emphasis in the original). In fact, as noted above, USX has **never** asserted a "good faith" defense, and Respondents cite no record evidence to the contrary. Indeed, the term "good faith" does not even appear in the legal memoranda referenced by Respondents. More to the point, and as recognized both by the Eleventh Circuit and the district court, **USX consistently has renounced any intent to rely upon a defense of advice of counsel, or to rely upon any privileged attorney-client communications in its defense.** USX App. A at 65a; USX App. B at 97a. This most fundamental of points is entirely ignored by Respondents.

Respondents, instead, attempt to make much of certain documents produced by USX during the course of the litigation. The apparent intent is to support an "unfairness" claim by accusing USX of the intentional creation of self-serving, "cover-up" type attorney-client communications which USX then, allegedly, voluntarily injected into the litigation. This argument is entirely specious for a variety of independent reasons:

1. To begin with, and most fundamentally, Respondents' contention that the Eleventh Circuit somehow premised its holding upon these documents, *Opp.* at 14, 19, is simply wrong. They played no role whatsoever in the Eleventh Circuit's holding on this issue. The Eleventh Circuit, like the district court, found a waiver of the attorney-client privilege by *USX's* assertion in legal memoranda that it believed its conduct was legal when engaged in. The propriety of that "state of mind" waiver doctrine is the issue here, plain and simple.

2. The various documents cited by Respondents were either not privileged or, if privileged, were produced inadvertently.

3. There exists no evidence to support Respondents' claim that self-serving attorney-client communications were created as part of some "cover-up", and neither the district court nor the circuit court made any such finding with respect to any document.

4. Finally, since USX expressly disclaimed any intent to rely on any privileged communication in its defense, Respondents' entire theory of an improper and prejudicial use of such communications during trial makes no sense. Similarly, in light of this unambiguous disclaimer by USX, Respondents' statement in their Opposition that such documents "will undoubtedly be placed before the jury", *Opp.* at 14, is simply wrong.

In addition to documents, Respondents in their Opposition also refer to certain deposition testimony given by USX witnesses wherein the witness made reference to having received "advice from counsel". Such references in no way advance Respondents' claim here. When these discovery responses were

given they were given in answer to direct inquiries of Respondents, and the witnesses were required to factually answer the questions presented.[2] As the district court succinctly explained:

> When defendants in this action responded to certain of plaintiffs' discovery requests with statements that they relied upon advice of counsel in certain circumstances, they were not raising a defense, they were stating a fact.

USX App. B at 97a.

Moreover, and more fundamentally, Respondents' suggestions that USX unfairly will rely upon such "advice of counsel" testimony at trial is incorrect. USX consistently has represented that it will not do so.

II. Respondents' Denial of a Circuit Conflict is Wrong.

Respondents attempt to argue away a direct circuit court conflict through the device of misstating the issue presented by this controversy. Specifically, Respondents suggest that USX intends to rely at trial upon advice of counsel or one or more attorney-client communications. If this were true, (and as noted above, it plainly is not) and if the Eleventh Circuit's holding was based on such conduct, there would be nothing remarkable about this Eleventh Circuit ruling. The circuit courts are uniform in their position that a waiver of the attorney-client privilege occurs in such circumstances.

Notwithstanding Respondents' efforts to mischaracterize the Eleventh Circuit's ruling, the decision below is not such a mainstream waiver holding. The district court and the Eleventh Circuit found a waiver of the attorney-client privilege here after fully acknowledging that USX did not intend to assert a defense

---

[2]Counsel for USX, of course, did not permit any further or follow-up questioning as to the substance of any advice the witness received from counsel.

of reliance upon advice of counsel and conceding that USX did not intend to rely upon a single attorney-client communication in its defense. The sole basis for the waiver holding was USX's allegedly injecting its "state of mind" (*i.e.*, knowledge of the law) into the case when it stated that it believed its conduct was legal when engaged in. In its holding, the Eleventh Circuit plainly and expressly aligned itself with those courts which have adopted this state of mind waiver doctrine first announced in *Hearn v. Rhay*, 68 F.R.D. 574 (E.D. Wash. 1975).

Just as clearly, the Third Circuit in *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851 (3d Cir. 1994), expressly rejected *Hearn v. Rhay* and its progeny as being of "dubious validity". In the Third Circuit it is clear that the attorney-client privilege will be waived only where the litigant asserts a claim or defense and discloses or describes a privileged communication in support of that claim or defense. Since it is indisputable that USX will not disclose or describe any privileged communication in the trial of this case, it is quite clear that no waiver would be found in the Third Circuit. Respondents have not and cannot "distinguish away" this direct conflict.[3]

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[3]Respondents attempt to distinguish *United States v. White*, 887 F.2d 267 (D.C. Cir. 1989), by characterizing that case as involving the mere denial of intent. Respondents argue that USX went "beyond mere denial of intent to assert that it believed that its conduct was legal." *Opp.* at 18. Ignored by Respondents, however, is the fact that in *United States v. White*, White not only denied intent but also asserted (as USX did here) that he **believed** his conduct was legal. 887 F.2d at 270. Similarly, Respondents attempt to harmonize the Eleventh Circuit's decision here with the Second Circuit's decision in *United States v. Bilzerian*, 926 F.2d 1285 (2d Cir.), *cert. denied*, 112 S.Ct. 63 (1991). The fact remains, however, that, in *Bilzerian*, the court held that counsel was free to argue "good faith" (*i.e.*, a belief in the legality of challenged conduct) in opening or closing statements without fear of a waiver of the attorney-client privilege. Respondents do not—and cannot—explain how such statements differ from statements of counsel in legal memoranda, as are at issue here.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, the petition for a writ of certiorari should be granted.

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